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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
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"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

VOL. LVI.

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AMERICAN DECISIONS.
VOL. LVI.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

LOVE AND WIFE *v.* ROBERTSON.

[7 TEXAS, 6.]

PRESUMPTION THAT PROPERTY PURCHASED DURING MARRIAGE IS COMMUNITY PROPERTY is very cogent, and can only be repelled by clear and conclusive proof; but where it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased.

PROPERTY PURCHASED WITH PROCEEDS OF HUSBAND'S PATRIMONY remains his separate property.

PROPERTY WHICH IS PARTLY COMMUNITY AND PARTLY SEPARATE PROPERTY of a deceased husband should be directed to be sold if found necessary to a proper distribution of the respective interests of the widow and the heir.

APPEAL from Washington. The case arose in the probate court out of a controversy between Mary Love, formerly Mary Robertson, widow of Jonathan Robertson, deceased, and his son and heir, F. F. Robertson, in reference to the ownership of two negroes, Peter and Finn. The widow claimed that the slaves were community property, and the heir claimed that they were the separate property of his father. The agreed facts were, that at the time of the marriage there was owing to the husband from the sale of his patrimony one thousand and thirty dollars, which he afterwards collected. With this money he purchased Peter for seven hundred dollars, and paid in the purchase of Finn the remaining three hundred and thirty dollars, leaving a balance unpaid for the latter slave of four hundred and seventy dollars. The sum of three hundred dollars of the last-named amount was paid by him with profits made during the marriage. The slaves had been hired out since the husband's death. The

probate court awarded the negroes and their hire to the heir, holding that they were the separate property of the deceased husband. The district court affirmed this judgment, and the widow and her present husband appealed.

B. Gillespie, for the appellants.

A. Sneed and W. S. Oldham, for the appellee.

By Court, WHEELER, J. The inquiry presented by the assignment of error is, Did the title to the property purchased by the husband during the marriage with the money which he received from the sale of his patrimony, vest in him as his separate property? or did it accrue to the community?

In the case of *Scott & Solomon v. Maynard and Wife*, Dallam, 548, in reference to authorities upon the laws of Spain cited in their opinion, the court say: "From an examination of these authorities, we are justified in concluding that under the Spanish laws property acquired during marriage by purchase, whether the acquisition be made in the joint name of husband and wife, or of either of them separately, must be considered as common property; and that if there be any exception to this general rule, it must be established by certain and positive evidence, or otherwise the presumption that the property is common will remain in all its force unimpaired."

In the case of *McIntyre v. Chappell*, 4 Tex. 187, we quoted the language of the supreme court of Louisiana, *Savenat v. LeBreton*, 1 La. 522, to the effect that by the Spanish law everything purchased during the marriage fell into the common stock of gains, whether purchased with the money of the community or that of either husband or wife. But to this rule there were exceptions: *Id.* The rigor of the rule, it was said, is applicable only to purchases, and does not necessarily include things which may be received by either husband or wife in payment of money due to them in their separate and individual rights: *Id.* Therefore property conveyed to the husband in payment of a sum of money inherited by the wife was held to be the paraphernal property of the wife: *Id.*

The language of the court, in the case last cited, does seem to favor the supposition that in the case of a purchase, though with the separate property of either husband or wife, the property acquired became community property. But such, it seems, was not invariably the rule. In *Ducres's Heirs v. Bijean's Estate*, 8 Mart., N. S., 192, it was held that by the laws of Spain if the money which the wife brought into the marriage, whether dotal

or paraphernal, was employed in the acquisition of an immovable (as slaves), the property became hers: *Id.* 197. And in *Borie v. Borie*, 5 La. 89, the court said: "It is true that by the Spanish jurisprudence and laws property purchased by the husband with the money of the wife became hers." In the case of *Terrell v. Cutrer*, 1 Rob. (La.) 367, of an adjudged case in *Dominguez v. Lee*, 17 La. 300, the court say: "In that case we held that when the wife retains the administration of her paraphernal estate, and the title is taken in her name, either as a purchase with the funds which she administers without the assistance of her husband, or as a *dation en paiement* made to her by a debtor of a separate and paraphernal claim, the property thus acquired remains paraphernal and does not fall into the community of *acquêts et gains*. We readily admit that the subject is not free from difficulties growing out of the very general dispositions of the law applicable to such cases. The wife's right to sell or otherwise alienate, and to administer her paraphernal property, is clear. Her right to reinvest the proceeds of her property thus disposed of would seem to be but a corollary from that principle:" *Terrell v. Cutrer*, 1 Rob. (La.) 368, 369. Again, in *Smalley v. Lawrence*, 9 *Id.* 214, the court say: "The land was purchased during the existence of the community; and although the receipts or certificates are in the name of the wife, still the property as much belongs to the community as if it stood in the name of the husband, unless she can prove that the purchases were made with her own money, or the property given in payment of a debt owing to her in her own right."

From these cases it seems clear that property purchased with the separate or individual money of either husband or wife does not necessarily belong to the community. From the language of the court in the case last cited it is to be inferred that "if the wife can prove that the purchases were made with her own money, or the property given in payment of a debt owing to her in her own right," the property, if an immovable, would not belong to the community.

Accordingly, in *McIntyre v. Chappell*, 4 Tex. 187, we held that negroes received by the husband during the marriage, in discharge of a debt due him for property which he had sold previously to the marriage, were his separate property. It is difficult to perceive any real distinction between this case and that. In the case of a purchase made during the marriage, it will in general be more difficult to prove the individual ownership of the money, from what source it was derived, and whose money

was really employed in making the acquisition, than in the case of the mere exchange of one article for another. A greater burden of proof will devolve on the claimant. The presumption that property purchased during the marriage was community property would certainly be very cogent, and would require to be repelled by clear and conclusive proof. But when it is established, as in this case, clearly and conclusively, that the property was purchased with the separate money of one of the parties, no reason is perceived why it should have a destination different from that of property received in payment of a debt due the party; or why it should not remain in the one case as well as in the other the separate property of the party with whose money it was purchased. Why should not the property purchased with the proceeds of the patrimony receive the same direction as property received in lieu of those proceeds?

Whatever difficulties the question may present, "owing to the general dispositions of the law applicable to such cases," in principle and reason there can be no difference in the cases and no difficulty in the question. Equity and justice require that the property in each case should have the same destination.

We are accordingly of opinion that the negroes purchased with the money which the husband received from the sale of his patrimony, to the extent of that money invested, did not belong to the community, but were his separate property; consequently, that the negro Peter was his separate property, and that he had an interest, distinct from the community, in the value of the negro Finn, proportionate to that part of the price paid with his money; the widow having a community of interest in the negro, and his hire since the death of the intestate, proportionate to that part of his price not so paid. The remainder of his price, due at the time of the dissolution of the marriage, remained a claim against the community; having been given to the heir by the holder, the half of it chargeable to the heir's interest in the community was extinguished; and the remaining half is chargeable to the widow's interest in the community.

We are of opinion, therefore, that the court erred in adjudging the negro Finn and his hire to the heir. The widow, as we have seen, had a community of interest in a part of his value and hire; which the court should have ascertained and adjudged to her; and if found necessary to a proper distribution of the respective interests of the parties, should have directed a sale of the negro.

We are of opinion, therefore, that the judgment be reversed; and as we have not the facts before us necessary to a final disposition of the case, it must be remanded for further proceedings.

Judgment reversed.

PROPERTY PURCHASED DURING MARRIAGE IS PRESUMED TO BE COMMUNITY PROPERTY.—This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife: *Huston v. Curl*, 8 Tex. 242; *Chapman v. Allen*, 15 Id. 283, both citing the principal case. All property of the husband and wife at the dissolution of the marriage is presumed to be common acquests or gains: *Bryan v. Moore*, 13 Am. Dec. 347; *Succession of Packwood*, 43 Id. 230. To rebut the presumption that property acquired during marriage is community property, the proof must be clear and conclusive: *Schmeltz v. Garey*, 49 Tex. 61, citing the principal case.

PROPERTY PURCHASED WITH MONEY DERIVED FROM SALE OF SEPARATE PROPERTY remains separate property: *Rose v. Huston*, 11 Tex. 326; *Oliver v. Robertson*, 41 Id. 425, both citing the principal case.

INTEREST OF HUSBAND AND WIFE IN COMMUNITY PROPERTY IS EQUAL: *Veramendi v. Hutchins*, 48 Tex. 550, citing the principal case.

THE PRINCIPAL CASE IS FOLLOWED in *Chappell v. McIntyre*, 9 Tex. 163.

IT WAS DECIDED in *Depas v. Mayo*, 49 Am. Dec. 88, that where a husband bought land in Missouri with money acquired in Louisiana during marriage, to the one half of which his wife was entitled by the law of the latter state, and took the title in his own name, he was after their divorce to be regarded as a trustee for the wife to the extent of her interest in the fund with which the purchase was made.

EASTERLING ET AL. v. BLYTHE ET AL.

[7 TEXAS, 210.]

PLAINTIFF, WHEN SURPRISED BY REJECTION OF HIS EVIDENCE, MAY TAKE NONSUIT, and then move to set it aside and reinstate the case; and if the evidence was erroneously rejected, and the court refuses to reinstate, its judgment will be revised on appeal or writ of error.

TITLE TO LAND CONVEYED TO ADMINISTRATOR VESTS IN HIM SUB MODO only, and for the purposes of the administration. He takes only temporarily for the benefit of creditors, if any, and of the heirs, and his right determines with the period of administration.

HEIRS MAY SUE FOR WHATEVER REMAINS OF ESTATE after it has been fully administered, and its liabilities to creditors have been extinguished.

ADMINISTRATION IS PRESUMED TO HAVE TERMINATED at the end of the period fixed by law.

LAW AFFORDS SAME PROTECTION TO EQUITABLE AS TO LEGAL TITLE, in an action of trespass to try title.

STATUTE DIRECTING THAT ACTION OF TRESPASS TO TRY TITLE SHALL BE TRIED "conformably to the principles of trial by ejectment," was not

intended to introduce all the incidents and consequences attached to that form of action at the common law; its object was simply to furnish a mode of procedure to ascertain in whom the right of property resides.

APPEAL from Washington. Trespass to try title, brought by the appellants as heirs of Charles Baird, deceased. The plaintiffs offered a deed from E. D. Jackson to John P. Coles, the administrator of their ancestor, executed more than ten years prior to the commencement of this action. The defendants objected to its admission in evidence, and the court sustained the objection, on the ground that the deed did not show sufficient legal title in the plaintiffs to enable them to maintain their action. The plaintiffs excepted to the opinion of the court and took a nonsuit, and thereafter moved to set aside the nonsuit and reinstate the case. The court refused the application, and the plaintiffs appealed.

A. M. Lewis, for the appellants.

J. Willie, for the appellees.

By Court, WHEELER, J. It is true that under the practice which obtains in most of the common-law courts of this country it is within the discretion of the court to reinstate a case after the plaintiff has voluntarily suffered a nonsuit, and if the court refuse the application, its judgment will not be subject to revision. This, however, is but a rule of practice; and in the case of *Holderman v. Croft* [MS. rep., not published], the supreme court of the republic adopted a different rule, as being more convenient in practice, which has been recognized by this court. The rule thus recognized is, that when the plaintiff is surprised by the rejection of his evidence, he shall not be compelled to proceed with the trial, but may take a nonsuit; and may then move to set aside the nonsuit, and reinstate the case; and if the evidence was erroneously rejected, and the court refuse to reinstate, its judgment will be revised on appeal or writ of error.

The objection to the admissibility of the deed in question is founded on the supposition that the legal title to the land conveyed by it did not vest in the heirs; and that this action can be maintained only by him in whom is the legal title.

The objection can not be maintained. The title vested in the administrator only *sub modo*, and for the purpose of the administration. He took only temporarily, for the benefit of creditors, if any, and the heirs. His right determined with the period of his administration. Because the administrator may

sue, it does not therefore follow that the heirs may not also sue, either jointly with the administrator, or without joining him where their interests require it, and there are no creditors whose rights would be thereby affected.

But if the heirs may not sue previously, they certainly may do so for whatever remains of the estate after it has been fully administered and its liabilities to creditors extinguished. Such it is to be presumed was the case in this instance. The deed in question was made to Coles, as administrator, ten years before the bringing of this suit. The period of his administration was fixed by law at one year; and in the absence of any evidence to the contrary, it will be presumed to have terminated at the end of that period. The legal presumption, therefore, is, that the administration had been long since closed, the liabilities of the estate extinguished, and the title or estate of the ancestor in the land, whatever that may have been, fully and absolutely vested in the heirs.

And as respects the right of the heirs to maintain the action, it is not material whether their title be considered a legal or an equitable title. The law affords the same protection to the one as the other. We have repeatedly decided that in respect to personal property the action may be maintained by the party in whom subsists the real ownership, irrespective of the question of whether his title be one of legal or equitable cognizance. And no reason is perceived why the same principle is not equally applicable to real property. We have heretofore determined that an equitable title may be interposed by a defendant to prevent a recovery in an action of trespass to try title; and we see no reason why a plaintiff may not recover upon such title: *Neill v. Keese*, 5 Tex. 23 [51 Am. Dec. 746].

The statute to which we have been referred, Hart. Dig., art. 3221, which directs that the action shall be tried "conformably to the principles of trial by ejectment," could not have been intended to introduce all the incidents and consequences attached to that form of action in the common law. Its object was not to determine upon what character of title an action may be maintained; but simply to furnish a mode of procedure to ascertain in whom the right of property resides.

We are of opinion that the court erred in rejecting the deed offered in evidence to show title in the plaintiffs as heirs of Charles Baird; and that the judgment be therefore reversed, and the cause remanded for further proceedings.

Judgment reversed.

COMPULSORY NONSUIT MAY BE DIRECTED BY COURT: See *Mateer v. Brown*, 52 Am. Dec. 303, note 312, where other cases are collected; *Van Rensselaer v. Jewett*, 51 Id. 275.

NONSUIT, WHEN GRANTED, AND UPON WHAT GROUNDS: See *Maxwell v. Harrison*, 52 Am. Dec. 385, note 389, where other cases are collected; *Eastman v. Howard*, 50 Id. 611.

WHERE PLAINTIFF IS FORCED TO DISMISS by a ruling of the court that is not erroneous, a motion to reinstate is addressed to the discretion of the court, and its refusal is not error: *Osborne v. Scott*, 13 Tex. 61, citing the principal case.

HEIR MAY SUE, AS WELL AS ADMINISTRATOR, to recover the lands of the intestate: *Howard v. Bennett*, 13 Tex. 314; *Patton v. Gregory*, 21 Id. 517; *Rogers v. Kennard*, 54 Id. 36, all citing the principal case. See also note to *Hubbard v. Ricart*, 23 Am. Dec. 200. In *Worthy v. Johnson*, 52 Am. Dec. 399, it was decided that heirs can sue only through the legal representative, except there be collusion, insolvency, unwillingness to collect the assets, or some other special fact. See also note to that case for other decisions of like import.

EQUITABLE TITLE WILL SUSTAIN ACTION FOR RECOVERY OF LAND: *Wright v. Thompson*, 14 Tex. 561, citing the principal case. In Texas an equitable title may be set up as a defense to an action of ejectment: *Neill v. Keese*, 51 Am. Dec. 746. In *Bank of South Carolina v. S. C. M. Co.*, 49 Id. 640, it was decided that in an action to try title, the plaintiff must have the legal title at the commencement of the action. See also the note to that case for a collection of cases on both sides of this question.

THE PRINCIPAL CASE IS CITED in *Guilford v. Love*, 49 Tex. 748, to the point that after the lapse of twenty-one years an estate should not be reopened for the purpose of completing a partition.

JONES v. TAYLOR.

[7 TEXAS, 240.]

ADMINISTRATOR'S DEED NEED NOT RECITE AT LENGTH DECREE OR PROCEEDINGS in the suit on which the decree for conveyance was founded. Such recital would not be evidence of their existence, except between the parties and their privies. As against a third party, the judgment or decree authorizing the conveyance must be produced.

ORDER OF PROBATE COURT REQUIRING ADMINISTRATOR TO EXECUTE TITLES to all lands for which the estate of the deceased stood bound is not authorized by the statute, and is therefore void, and an administrator's deed which recites such order furnishes intrinsic evidence of its own nullity.

VENDEE OF LAND UNDER EXECUTORY CONTRACT DOES NOT WAIVE OBJECTION to the title merely by going into and remaining in possession. There must be other facts, such as show that he had a knowledge of its defects, and intended to accept such title as could be made, and to rely, in case of its failure, upon the covenants of warranty for redress.

APPEAL FROM LEON. The action was brought on a note given for the purchase of a tract of land. The plaintiff, at the date of the

contract, executed his bond for title, covenanting that in a reasonable time he would make a good and sufficient deed upon the payment of the note. The defendant averred his readiness to pay on the execution of the title, but alleged that the plaintiff had no good title in fee simple to the premises, the same being outstanding in one Robert Rogers. The plaintiff replied that he had tendered a deed to the defendant. This deed was executed on the seventh of May, 1851. The plaintiff claimed under a deed from Nancy Taylor executed the same day. Her title to the premises was supposed to be perfected under a conveyance from Robert Rogers, administrator of his father, Robert Rogers, deceased, dated the thirteenth of September, 1850. It was admitted that Robert Rogers, sen., had a title directly from the government; that in his life-time he executed a bond for title to James Erwin, who assigned to C. D. Taylor, who devised the lands to his wife, Nancy Taylor; that the administrator of Rogers, deceased, conveyed to Nancy Taylor, and she conveyed to the plaintiff; and that the defendant, after the sale, had lived on the premises. The other facts appear from the opinion.

Barziza, for the appellant.

By Court, HEMPHILL, C. J. Several errors were assigned, presenting, however, but two points deserving consideration, viz.: whether the vendor had exhibited proof of legal title in himself; and if not, whether he was nevertheless entitled to recover. As to the first, it was urged that the deed of the administrator, by way of recital, should have contained a narrative of the principal proceedings in the suit on which the decree for conveyance was founded, and also the decree; and that for the want of this the deed was void and conveyed no title.

By reference to the section of the statute under which the proceeding was had, Digest, art. 1162, it will be seen that no directions are given as to the matters which shall be recited in the deed of the administrator; he is not required, expressly, to set forth at large the proceedings or decree; and their recital does not therefore constitute an essential part of the conveyance; nor is it evidence of their existence except between the parties and their privies: *Harrison v. Maxwell*, 2 Nott & M. 348 [10 Am. Dec. 611]; *Jackson v. Roberts*, 11 Wend. 425; *Jackson v. Pratt*, 10 Johns. 381; *McGuire v. Konns*, 7 T. B. Mon. 386; Cowen & Hill's Notes to 4 Phill. Ev. 835, 836. Such recitals are convenient to all parties interested in the conveyance as facilitating

inquiries into the title; but nevertheless they are inserted by authority of statute, they do not constitute such evidence as will, against a third party, support the right claimed under the deed. The judgment or decree authorizing the conveyance must be produced; and however extended the recitals of the administrator may have been, yet they would have constituted no protection to the vendee without proof of the decree which gave the power to convey: *Howard et Ux. v. North*, 5 Tex. 290 [51 Am. Dec. 769].

There was no error, then, in refusing to instruct the jury that the proceedings or decree must be set forth at large in the deed. It seems, upon the authorities, that the order or decree should be identified in the deed, and that the capacity in which the administrator acts should be made to appear: *Watson v. Watson*, 10 Conn. 77; *Inman v. Jackson*, 4 Greenl. 248; *Hickman v. Skinner*, 3 T. B. Mon. 211; 4 Phill. Ev. 836. But a mistake in the recital of the order would not vitiate if a sufficient power to convey be found: *Jackson v. Pratt*, 10 Johns. 381.

But the difficulty presented by the recitals in this deed is not that there is no reference at all to the power under which the administrator acted, or that it is not sufficiently set forth, but that the recital identifies an order of the probate court which in itself and as it is recited is a nullity, and confers no authority in law upon the administrator to convey. The order as described requires the administrator to execute titles to all lands for which the estate of the deceased stood bound. This order is comprehensive; not made on consideration of the matters presented in a cause litigated between certain parties; but extends to all the obligations of the deceased to convey; confers on the administrator a discretionary power to determine on the validity of such obligations, and to convey accordingly. And whether such be the extent of the power contained in the decree or not, at all events it is such as is not authorized by the statute. The mode of proceeding is in the section specifically detailed; the vendee must file his complaint in writing; the chief justice, in the exercise of his judgment, must find (and this of course on satisfactory and competent evidence) that the sale was legally made; and the order must be for title in conformity with the tenor of the bond. The authority conferred on the probate court by the section is special and limited and must be strictly pursued, otherwise the acts and proceedings had thereon are nugatory and confer no right.

If there be a decree which in fact authorizes the conveyance,

none such was produced. The defect might have been aided had the power been conferred by a proper decree; and its production was incumbent upon the vendor had it in fact existed; but the deed as it now stands, and as it was offered in support of the action, destroys itself. It furnishes intrinsic evidence of nullity and has no capacity to pass the title; the legal title still remains in the succession of the deceased. It has not been transferred to the vendor, and if this be necessary to recovery, the judgment is erroneous.

The second point is, whether this be necessary. The contract in this case is executory; and though the vendee went into and remained in possession, yet this does not amount of itself to a waiver of objection to the title. There must be other circumstances, such as show that he had a knowledge of its defects, and intended to accept such title as could be made; relying, in case of failure, upon the covenants of warranty for redress: *Winne v. Reynolds*, 6 Paige, 407; *Van Lew v. Parr*, 2 Rich. Eq. 322. The facts in this case are quite meager. The vendor had no title at the time of the sale, nor at the commencement of the suit, nor until one day before the trial. And the deed from the administrator to Nancy Taylor was not executed until after the commencement of the suit. What knowledge the vendee, at the time of the sale, had of the title was not proven, nor is it to be inferred from the facts in evidence. From the bond it appears that he was apprised that the land was the headright of Rogers; but it does not appear that he knew under what title it was claimed by the plaintiff. The bond of Rogers to Erwin, his assignment of the same to C. D. Taylor, and his devise to Mrs. Taylor, are not shown to have been on record, or that the defendant was apprised of their existence or contents, or even that they could have been ascertained by reasonable diligence. Under the facts, then, of this case, the instruction that a complete chain of title must be produced by the vendor was correct; and there is therefore error in the judgment.

What may be the proper proceeding to procure the title remaining in the succession of Rogers must be left to the plaintiff as he may be advised. It is however deemed not inappropriate to throw out some suggestions in relation to the effect of the decree and title under the section of the statute of 1848, Digest, art. 1162, to which we have referred. At best, such title constitutes but a flimsy protection to the vendee or those claiming under him. The decree is not conclusive of the rights of

parties interested in the property, although they are represented by the administrator in the proceeding; on the contrary, it may be but the commencement, and may of itself be the foundation of repeated and protracted litigation. In the first place, it is the subject of attack for two years by any one interested in the estate, and may be annulled if good cause be shown why the same should not have been made; that is, if there be error in the judgment, or fraud or collusion in the proceedings. If the vacation of the decree annuls all titles held under it, though executed anterior to the institution of the suit of nullity, it would afford no protection to a purchaser, however innocent of the fraud or collusion of the parties to the suit, or ignorant or mistaken as to the errors in the judgment. But by the last proviso of the statute the decree of the probate court is almost completely emasculated and deprived of all conclusive force and conservative efficacy. Under that, all married women, minors, and persons of unsound mind interested in the estate shall have two years after the removal of their disabilities to have the order annulled on showing cause. If creditors be included in the class of persons interested in the estate, the decree and titles emanating by virtue of its authority may be attacked by a host of assailants, either in conjunction or in squads or singly, and this for the space of perhaps half a century or more; at least, for the life-time of the longest-lived husband of any female creditor or heir in existence at the date of the decree.

This occasion is not inappropriate for the expression of some opinion as to the supposed disability of the wife during marriage, and its total want of adaptation in its extent and operation as dependent on this and similar provisions of statute, to the rights or liabilities of married women owning separate rights, interests, or property in this state. The doctrine of the incapacity of the *feme covert*, as it exists at common law, can claim such merit as, even in error and wrong, may be attributable to systematic consistency and uniformity. If it be irrational and barbarous, it harmonizes and is in consonance with, and is the result of, rules equally unreasonable and equally tinged with the reading of the dark ages. It is the legitimate inference from the portentous doctrine, that, during coverture, the separate legal existence of the wife is extinguished, or in other words, that her reason, faculties, and intelligence are entombed; while, from her legal tomb, in the language of a forcible writer (Hurlbut on Human Rights), her husband gains an accession of power, dignity, and rights; "her submission exalts the throne

of his power; her legal insignificance elevates his dignity; and her lost rights are appropriated to himself." This annihilation of the power of the one and augmentation of that of the other partner in matrimony has its origin in, and is principally supported by, that most cherished portion of the "immemorial policy" of the common law, viz., that by coverture the property of the wife generally vested in the husband. If, by marriage, she was divested of her faculties as a rational being, and which to that moment she had fully enjoyed, she was injured, such was the consistency of wrong, and likewise stripped of her property.

But when, under the creative power of courts of equity in English jurisprudence, the separate estate of married women was brought into existence, their capacities, reason, and moral being were likewise resuscitated. Touching her separate property, the married woman had, in a great degree, all the capacities of a single woman. The right of property vested in her the right of disposition, control, and management; as to that, her existence was not merged in that of the husband. She had distinct and independent rights, and could separately prosecute and defend them in courts of justice: *Vide* Daniell's Ch. Pr., c. Married Women; Bright on Husband and Wife.

The absorption of the wife's property, by the husband, on marriage, is effectually prohibited by the constitution and laws of this state. The property of the wife does not vest in the husband; and I see no reason why her faculties and powers, as a moral agent, in relation to that property, should be supposed to vest. The doctrine on which such merger principally rested is swept away; and it is a maxim as old as the law, that where the reason of a rule ceases, itself should cease. If a married woman, in England, by the benign power of a court of equity, be relieved from disability, and can protect her rights in her separate property, why should such incapacity be inflicted upon her in Texas, to her own detriment and the injury of others? There can be sufficient guards thrown around the rights of women, to protect them from the supposed evil artifices or negligence of their husbands, without destroying the rights of others, and fettering and chaining up property from alienation, and rights from adjustment, for forty and fifty years or more.

The law provides remedies for fraud or collusion, if they be pursued within a reasonable time; and if it be true, in fact or in law, that husbands, as a class, and generally, will not, from knavery, folly, or negligence, prosecute or defend the rights of

their wives in their separate property, let the wives conduct their own suits in relation to their own property; or, if the husband be joined as a matter of form, let the court be required to institute such inquiry as will show satisfactorily that the wife is not succumbing to the malign influence and designs of her husband or others. The court is as competent for these inquiries as a notary public; and further, it can immediately enforce a just respect for her rights. The subject is too comprehensive for discussion in this mode; and I will return to the effect and operation of a decree of the probate court, made under authority of the statute.

Can such decree, or a title under it, of themselves form a valuable consideration for a contract? This question I am strongly inclined to answer in the negative. Its value or force must depend on circumstances extraneous to the judgment, and not upon the judgment itself, or the fact that the parties attacking the decree were represented in the proceeding by their agent, in whom by law the estate then temporarily vested. If it were proven that there are no creditors, or that the assets of the estate were otherwise sufficient to satisfy its obligations, or that there are no married women or infants interested in the estate, the decree would then afford protection, and be a sufficient consideration on which to enforce a performance of the contract. But where it is otherwise, and where it does not appear from the facts or circumstances that the vendee is bound to accept such title, it would be unconscientious to force that upon him which, instead of being a permanent security or muniment of title, might be a perpetuity of litigation and strife.

Why should the defendant in this case, if there be married women or infants interested in the estate, be compelled to ascertain whether there be error in the judgment or fraud and collusion between the administrator and Mrs. Taylor? The latter may elude his most diligent search, though in the lapse of twenty or thirty years subsequently it may transpire; and, if we were well advised that on established principles there was no error in the judgment, could we rest securely upon this foundation, when the hundreds or thousands of overruled decisions show that the law itself in effect changes; and that what may not now be considered as error may forty years hence be found to be so?

If, on annulling the decree, redress could be had only against the administrator and his sureties, as is the case generally for acts of malfeasance by the administrator, then the decree would

afford all the protection which could be demanded; but if it be otherwise, and such appears to have been the intention of the law, the judgment of the court is no safeguard or security.

Where such title is offered by the vendor, it appears to me that the rule generally should be, in cases where there is any doubt as to the validity of the decree, or where danger might be apprehended from the assertion of the rights of persons interested in the estate, and where the defendant is not compromised to the acceptance of such title, that the contract should be annulled, or the collection of the money enjoined until all the disabilities are removed, although these should continue for one half-century. This rule would of course be subject to such modifications as would be required by the equities of particular cases: *Bryan v. Read*, 1 Dev. & B. Eq. 84; *Simpson v. Hawkins*, 1 Dana, 308. The disabilities of infants and married women are designed as shields for their protection, and can not be employed as swords to destroy the rights of others. If property must be shackled and fettered for their benefit, it can not in this manacled condition be thrust upon others as a valuable consideration for an onerous contract.

I will not further pursue the consideration of this subject. I have made these remarks in order that there may be no necessity for this cause to appear again in this court, but that the title from the administrator may be perfected in such mode as may give security to the vendee, or at least such security as he is entitled, under the real facts of the case, to demand.

It is ordered, adjudged, and decreed that the judgment be affirmed, and that the plaintiff have until such time as may be deemed sufficient by the district court to perfect the title from the succession of Robert Rogers, deceased, the validity of the title to be determined by the court, and that in the mean time the collection of the money on this judgment be enjoined. And should it, in the opinion of the court, be out of the power of the plaintiff to perfect the title, then the defendant shall be compelled to accept his deed with warranty, or restore the premises—and so account for the rents and profits as may accord with equity and justice, and that the injunction be then made perpetual; and it is further ordered that the appellee pay the costs heretofore expended.

Ordered accordingly.

ADMINISTRATOR'S DEED, FORM AND CONTENTS OF.—“Irrespective of any statutory directions on the subject, every administrator's, executor's, or

guardian's deed should refer to the authority or license under which it is made; should state that the person making it acted under such license; and should contain apt words to convey the estate of the ward or decedent, as contradistinguished from the private estate of the person executing the deed; but it need not recite all the steps taken in making the sale, as that the sale was at public auction, and that the grantee was the highest bidder." Freeman on Void Judicial Sales, sec. 45; Rorer on Judicial Sales, 187; *Griswold v. Bigelow*, 6 Conn. 258; *Lockwood v. Sturdevant*, Id. 373; *Watson v. Watson*, 10 Id. 77; *Brown v. Redwyne*, 16 Ga. 67; *Davenport v. Young*, 16 Ill. 548; *Bobb v. Barnum*, 59 Mo. 394; *Kingsbury v. Wild*, 3 N. H. 30. And it was decided in the case last cited that an administrator's deed need not be signed by the grantor as administrator, if the capacity in which he acted appears in any other part of the deed.

But it must be borne in mind that the power of an administrator to sell and convey the real estate of his intestate is derived solely from the statute, and he is bound, therefore, to comply with all the requirements of the law which confers the authority upon him: *Williamson v. Williamson*, 4 Am. Dec. 636; *Wyman v. Campbell*, 31 Id. 677; *Atkins v. Kinnan*, 32 Id. 540; *Bloom v. Burdick*, 37 Id. 299; *Worten v. Howard*, 41 Id. 607; *Doe v. Henderson*, 48 Id. 216; *Stevenson's Heirs v. McReary*, 51 Id. 102; *Worthy v. Johnson*, 52 Id. 399; *Smith v. Hileman*, 1 Scam. 323; *Knox v. Jenks*, 7 Mass. 488; *Corwin v. Merritt*, 3 Barb. 341; *Schneider v. McFarland*, 4 Id. 139; *Redfield on Law and Pract. of Surr. Cts.* 489. An administrator's deed made without an order of sale is void: *Clements v. Henderson*, 4 Ga. 148; *Adams v. Harris*, 47 Miss. 144; *Goforth v. Longworth*, 19 Am. Dec. 588. An administrator's deed which neither recites the power to sell, nor that the estate conveyed belonged to his intestate, does not convey the interest of the decedent: *Davenport v. Young*, 16 Ill. 548.

The Illinois act of 1827 required that an administrator's deed should set out "at large" the order of the court for the sale of the intestate's real estate. Under this statute the supreme court of that state decided that a deed which did not recite the order of sale at large, but simply gave its substance, was invalid, and could not be received in evidence in an action of ejectment to support the title of the grantee: *Smith v. Hileman*, 1 Scam. 323. Smith, J., in delivering the opinion of the court, said: "It is sufficient to perceive that a recital of the substance of the order is not a compliance with or an observance of the act." It is not easy to discern the reason or justice of this decision, and its correctness has been questioned: Freeman on Void Judicial Sales, sec. 45. The provision in the New York statute also required the administrator's deed to contain and set forth at large the original order authorizing the sale; and it was held, under that statute, in *Atkins v. Kinnan*, 32 Am. Dec. 534, that where a deed failed to set out the order either at large or in substance, the conveyance was invalid. Cowen, J., who delivered the opinion of the court in that case, referring to the order of sale, said: "We do not say it should be literally recited; but it is impossible to say that a document is set forth at large unless every part is substantially presented. That we think is the least that the statute calls for."

But in *Sheldon v. Wright*, 5 N. Y. 497, it was decided that a mistake in reciting the order of sale in a deed made by an administrator in pursuance of a sale under such order did not vitiate the deed, where other parts of the deed furnished of themselves obvious means of correcting the error. It is very generally held that where an attempt is made to set out the authority under which the deed is made, mere mistakes or misrecitals will not have the effect

of rendering the whole deed void, if the mistakes can be corrected either by other parts of the deed itself or from the records of the proceedings in the probate court. "Although a statute requires the order of sale and also that of confirmation to be referred to or set out in the deed, a mere mistake in the reference is not fatal, if it appears from the deed, taken as a whole, that the reference as made is a mistake, and that it was intended to embrace the orders under which the sale and deed were in fact made:" Freeman on Void Judicial Sales, sec. 45. "Mere misrecitals in the deed as to the order of sale or previous proceedings will not invalidate the conveyance and title, if enough appears from the whole record, deed, and proceedings to clearly identify the real case, and show the true facts and circumstances under which the deed is made:" Rorer on Judicial Sales, sec. 442; *Thomas v. Le Baron*, 8 Met. 355; *Moore v. Wingate*, 53 Mo. 398; *Garner v. Tucker*, 61 Id. 427; *Lessee of Glover's Heirs v. Ruffin*, 6 Ohio, 255. An administrator's deed, which contains all the recitals as to notice, appraisement, sale, etc., required by the statute, but sets out certain dates which are irreconcilable, may be explained and corrected by the introduction of the appraisement, report of sale, and other like original papers. Such errors are merely clerical ones, which may be corrected by extrinsic evidence: *Moore v. Wingate*, 53 Mo. 398. So the use of the words "probate judge," in an administrator's deed, where the words "probate court" ought to have been used, does not invalidate the deed: *Brubaker v. Jones*, 23 Kan. 411. Of course the necessity of setting out or reciting the order of sale in the deed depends largely upon the wording of the particular statute, and to some extent also upon the strictness of the rule established by the courts of a particular state. Thus the statutes of both New York and Illinois required the order to be set out "at large" in the deed; but the courts of the latter state seem to have established a much stricter rule of construction than those of the former. In Georgia, as well as in Texas, it is sufficient if the substance of the order or decree is set out in the deed: *Brown v. Reddyne*, 16 Ga. 67; Rorer on Judicial Sales, 187. In Connecticut, it is held that, though in the conveyance of land by an administrator, under an order of the probate court, his authority must appear on the face of the order; yet where these requisites exist, it is not necessary to specify in the deed the grounds on which the court of probate proceeded in making the order: *Watson v. Watson*, 10 Conn. 77. In delivering the opinion of the court in *Tutt v. Boyer*, 51 Mo. 425, 430, Adams, J., said: "Although there is some conflict in the authorities as to what defects ought to render administrators' sales void in collateral proceedings, the tendency of the decisions of our own court is not to view them with a very critical eye, but to maintain their validity when the directions of the statute have been substantially complied with." It is believed that a similar tendency may be seen in the later decisions in other states. Deeds executed in pursuance of execution and chancery sales are rarely treated as void on the ground of defects or mistakes in matters of form. If such deeds are executed with the formalities essential to other deeds, and show that the persons who sign them are acting in an official capacity, and not merely conveying their own titles to the property, the deeds are held to be sufficient in form: Freeman on Void Judicial Sales, sec. 45; Freeman on Executions, sec. 329; Rorer on Judicial Sales, sec. 365. But it appears that in some states deeds executed by administrators, executors, and guardians are treated with less indulgence than sheriffs' deeds, particularly where a statute has directed that some statement or recital shall be set forth in the deed: Freeman on Void Judicial Sales, sec. 45.

If an administrator's deed recites a performance of the acts required by

the statute to be done, it will be *prima facie* evidence of their having been done: *Doe v. Henderson*, 48 Am. Dec. 216; *Clements v. Henderson*, 4 Ga. 148; *Chase v. Whiting*, 30 Wis. 544. But recitals in a deed, which do not constitute an essential part of the conveyance, are not conclusive against third persons of the facts recited: *Jackson v. Roberts*, 11 Wend. 422.

WHERE ADMINISTRATOR DIES BEFORE EXECUTION OF CONVEYANCE in pursuance of an order of sale, it was held in *Davis v. Brandon*, 1 How. (Miss.) 154, that the administrator *de bonis non*, afterwards appointed, can not execute the deed. In *Brown v. Redwyne*, 16 Ga. 67, a contrary doctrine was held. In Illinois it is provided by the statute that "in case of the death of the executor or administrator applying for an order of sale before conveyance is made, the administrator *de bonis non* shall proceed in the premises, and make conveyance in the same manner as if he had originally applied for such order." R. S. Ill., c. 3, sec. 108 (1883). But a deed executed by an agent for and in the stead of an administrator, and purporting to convey real estate which had been previously sold by such administrator, conveys no title to the grantee: *Gridley v. Phillips*, 5 Kan. 349.

EFFECT OF COVENANTS IN ADMINISTRATOR'S DEED.—An administrator selling land under a license is not bound by any duty of his office to enter into a personal covenant for the perfection of the title which he undertakes to convey, or for the validity of the conveyance beyond his own acts. He may so covenant if he chooses. But such covenant, though expressed to be made in his official capacity, is a personal covenant, for the breach of which he is personally liable. Such covenants will not bind the estate: *Smith's Probate Law*, 198; *Gary Probate Law*, sec. 534; *Rawle on Covenants*, 4th ed., 49; *Sumner v. Williams*, 5 Am. Dec. 83; *Mitchell v. Hazen*, 10 Id. 169; *Worthy v. Johnson*, 52 Id. 399; *Coe v. Talcott*, 5 Day, 88; *Aven v. Beckom*, 11 Ga. 1; *Chastain v. Staley*, 23 Id. 26; *Mason v. Ham*, 36 Me. 573; *Whiting v. Dewey*, 15 Pick. 428; *Magee v. Mellon*, 23 Miss. 585; *Osborne v. McMillan*, 5 Jones L. 109; *Lockwood v. Gilson*, 12 Ohio St. 526; *Prouty v. Mather*, 49 Vt. 415. An administrator's deed which does not describe the property thereby conveyed so that it can be located is void: *Jones v. Carter*, 56 Mo. 403.

THE PRINCIPAL CASE IS CITED in *Tod v. Caldwell*, 10 Tex. 243, to the point that probate courts have jurisdiction to decree specific performance of executory contracts of decedent for sale of land; in *Neel v. Prickett*, 12 Id. 138; and in *Demaree v. Bennett*, 29 Id. 267, to the point that, in executory contracts for the sale of lands, the purchaser has the right to resist payment of the purchase money, on the ground of defect of title in the vendor, unless the vendee knew of the defects at the time of the sale, and intended to accept such title as could be made; in *Cooper v. Singleton*, 19 Id. 262, to the point that the mere fact that a vendee goes into possession does not in itself amount to a waiver of objection to the title; in *Gober v. Hart*, 36 Id. 141, to the point that it is not necessary that a vendee should be evicted from possession before he can resist payment of the purchase money, provided he shows that there is a superior outstanding title which may at any time be asserted; and in *Guilford v. Love*, 49 Id. 745, to the point that the authority conferred on the probate court to order sales of decedents' lands is special and limited, and must be strictly pursued.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

HATCH *v.* BARNUM.

[23 VERMONT, 133.]

ACTION FOR GOODS SOLD AND DELIVERED NOT BARRED by an agent, who was authorized to receive the vendee's note for the price, receiving a note of a less amount, signed by the vendee as agent of a third person, under the vendee's representations that it was the latter's note for the price, and delivering the same to the vendor, who did not consent to accept it as payment; nor does it affect the rights of the vendor that he retained the note until the commencement of the action without taking measures to enforce its collection, or giving notice of its non-payment, or offering to return it.

INDEBITATUS ASSUMPSIT for goods sold and delivered. The plaintiff gave evidence to show that his agent, one Chase, had agreed to sell a quantity of potatoes at a certain price to the defendant, and soon after, by the direction of the latter, delivered a certain number of bushels to him at the store of Smith & Co. Chase was afterwards directed by the plaintiff to obtain payment for the potatoes of the defendant, but if he could not get pay, to take his note; whereupon Chase obtained from the defendant a note made by the latter for a less amount than the price, and signed by the defendant, but as agent for Smith & Co.; the defendant representing to Chase, who could not read writing, that it was the defendant's note for the amount of the potatoes. The note was afterwards delivered to the plaintiff, who produced it upon the trial, and offered to surrender it to the defendant, but the latter did not receive it. The testimony on the part of the defendant tended to show that Smith & Co. had failed since the giving of the note. It was insisted by the defendant that Chase's

receiving the note and delivering it to the plaintiff barred this action; but the jury were instructed that the note was not a payment of the plaintiff's claim, and would not bar the action, if the defendant represented to Chase that the note was his individual note, and it was so received by Chase; but if the plaintiff was aware of the facts in relation to the giving of the note, and then consented to receive it as a note against Smith & Co. on his claim for the price, it was a bar to the action; and whether he did consent was a question of fact for them to determine; and also, that the mere fact that the plaintiff retained the note as he did, after its delivery to him, without any proof of a previous offer to return it, would not bar the action. Verdict for the plaintiff, and exceptions by the defendant.

S. Wires and W. W. Peck, for the defendant.

Maynard and Edmunds, for the plaintiff.

By Court, KELLOGG, J. That the defendant was not entitled to the charge requested, upon the case presented by the exceptions, we think is very clear. The note of Smith & Co., which the defendant passed to the agent of the plaintiff, was not the note which the agent was authorized to receive, and which he had reason to suppose he was receiving; for the defendant assured him it was his, the defendant's, note, and that it was for the amount of the plaintiff's demand—which was untrue, not only as to its being the note of the defendant, but also as to its amount; and this the defendant must have known. The agent was illiterate and could not read writing, and the conduct of the defendant was an imposition. It was, if correctly stated by the witness, a gross fraud, from which the defendant ought not to be allowed to derive advantage nor the plaintiff to sustain injury.

Nor can laches be imputed to the plaintiff, by reason of his retaining the note for the period he did without taking any measures to enforce collection; for the circumstances, under which the note came to the hands of the plaintiff, imposed upon him no duty or obligation to look to Smith & Co. for payment, or to give any notice to the defendant of its non-payment, or even to return the note, except, perhaps, upon the defendant's request. Such reception of the note by the agent, under the circumstances attending it, can be no bar to this action.

The plaintiff, when the note came to his hands, might have consented to accept it in payment; and in that event he would have been bound by the act, and in this respect the case seems

to have been properly submitted to the jury. Indeed, the entire charge appears to us to be well adapted to the case, and to be unexceptionable. It was all that the defendant could claim, and all that the case demanded.

The judgment of the county court is therefore affirmed.

NOTE WHEN PAYMENT OF PRE-EXISTING DEBT: See *Wolf v. Fink*, 44 Am. Dec. 141, and prior cases in note thereto: *Steamboat Charlotte v. Hammond*, 43 Id. 536; *Lee's Adm'rs v. Fontaine*, 44 Id. 505; *Costar v. Davies*, 46 Id. 311; *Arnold v. Delano*, 50 Id. 754; *Melledge v. Boston Iron Co.*, 51 Id. 59, and notes. The holder of a note taken in payment of a precedent debt, at the maturity of the note, may, at his election, proceed either on the note or on the original cause of action: *Mudd v. Harper*, 54 Id. 644.

PITKIN v. FLANAGAN.

[23 VERMONT, 160.]

ACCOMMODATION INDORSERS ARE PRIMA FACIE CO-SURETIES, as among themselves, when they successively sign the paper before it goes into circulation.

ORDER OF INDORSEMENT OF ACCOMMODATION INDORSERS RAISES NO PRESUMPTION OF DIFFERENT OBLIGATION among themselves from that growing out of the other facts of the case, where they all sign the paper before it is put in circulation, and at the request of the person for whose benefit it is made, and to give him credit.

ASSUMPSIT against the defendants as indorsers of a bill of exchange. B. & H. Boynton, who were indebted to the plaintiff, executed and delivered to him their promissory note, which he discounted at the Bank of Burlington. In order to take up this note, B. & H. Boynton afterwards drew the bill in question upon Ray Boynton, who accepted it, and it was then indorsed successively by Jedediah Boynton, the payee, and by the defendants for the accommodation of the drawers. The bill was presented by B. & H. Boynton at the bank for discount, but the bank refused to discount it unless the plaintiff indorsed it, which he did at the request of B. & H. Boynton, after being informed by them of what had transpired. The bill which was then received by the bank, and its proceeds applied to the payment of the note, was duly presented and protested, and the parties notified, and the plaintiff was compelled to pay its entire amount. The defendants had paid to the plaintiff one half of the amount so paid by him, and all costs up to the time of entering the suit in court, and the plaintiff now seeks to recover the balance paid by him. The plaintiff had judgment for the

amount he had paid, deducting what was paid him by the defendants. Exceptions by the defendants.

A. Peck and C. D. Kasson, for the defendants.

S. Wires and W. W. Peck, for the plaintiff.

By Court, REDFIELD, J. So far as we know, or can learn from the English books upon the subject, this kind of paper, which comes up in the present case for the mere purpose of obtaining bank discounts, is not much known in Westminster hall. It seems to be mostly an invention of a cisatlantic origin. For this reason, probably, we find almost nothing in the English books which affords much aid in determining the case.

What is said in Story on Prom. Notes, sec. 292, and in *Cory v. Scott*, 3 Barn. & Ald. 619, only shows, at most, that an accommodation indorser is entitled to notice of non-payment, where he had any other party to whom he could resort for indemnification. And the court say such an indorser clearly could resort to the party for whose accommodation he drew or indorsed the bill, and is therefore clearly entitled to notice. And the judges incline also to the opinion that such a drawer is entitled to go against the acceptor, upon the ground that as between them the undertaking of the drawer is subordinate to that of the acceptor, even when both are for accommodation of some third party merely, upon the ground that one who consents to stand as acceptor, although merely for accommodation, is bound to indemnify the drawer and indorsers for accommodation also. But this point is not fully settled there, and is one upon which the cases are not, perhaps, altogether decisive. But if it were conceded, it is certainly not decisive of the present case. That must go upon the ground of an implied understanding, growing out of the relation in which the parties stand to each other on the bill. For in the very case of *Cory v. Scott*, the party for whose accommodation the bill was drawn, accepted, and indorsed stood as indorsers themselves, and, *prima facie*, might go against the drawer and acceptor; but it was clearly held, that upon the facts the drawer might go against them—and so also the acceptor for accommodation.

So, too, in the present case, although B. & H. Boynton might have appeared as the last indorsers, any of the prior parties who signed for their accommodation might clearly go against them. And it seems very clear to us, that parol proof is competent to be received to show the circumstances under which the plaintiff and defendants signed this bill. And unless there

is some settled rule of law, which the defendants are bound to know, and which the court must presume the parties acted upon in signing this paper, by which successive indorsers, for accommodation merely, are understood to have a right to indemnity against all prior indorsers, then the case should be decided upon the natural import of the transaction as it occurred, which is, that the plaintiff signed as an additional surety for B. & H. Boynton. In regard to the admission of evidence to show the import of a blank signature upon negotiable paper, as between the immediate parties, we do not desire to say more than to refer to the cases already decided in this state, and which we think clearly applicable to the present case: Washb. Dig. 674; *Sandford v. Norton*, 14 Vt. 228, and cases cited. Upon the question whether the facts which appear in the present case, in their natural bearing, aside from any artificial weight which the law may give them, show a case of joint suretyship or not, we feel constrained to say that the case is altogether clearer, in our judgment, in favor of that construction against the plaintiff, than is the case of *Flint v. Day*, 9 Id. 345, where defendant was held liable to contribution as co-surety.

There are many cases in the books where one has signed as surety after other sureties had signed, where he has been held not liable to contribution. That must always be the case, where it is so agreed between him and the other sureties, either expressly or by reasonable implication. And some of the New York cases allow of such a construction upon slight evidence, if we recollect correctly. In *Harris v. Warner*, 13 Wend. 400, where the last surety upon a note signed "as surety for the above names," he was held not liable to contribute to a prior surety. And in *Longley v. Griggs*, 10 Pick. 121, one who guaranteed the sufficiency of a note signed by sureties was held not liable to contribution. But the case of *Flint v. Day* would seem to require the consent of the other sureties to such an arrangement, in order to give a surety a right to go for the whole debt against a prior surety: *Lapham v. Barnes*, 2 Vt. 213. But some of the cases seem to hold, that if the last surety limit his liability to the default of the principal and all the other sureties, he has a claim for full indemnity against them all jointly: *Craythorne v. Swinburne*, 14 Ves. 160, and other cases cited in the note to *Dering v. Earl of Winchelsea*, 1 White & Tudor's Leading Cases in Equity, 60.

The present transaction, in its natural import, was nothing

more than B. & H. Boynton obtaining a discount at the bank of Burlington, and applying the money to pay a debt they owed the plaintiff by his signing for them, together with the defendants, both signing at the request of the principals, and without any communication with each other. The case, in its facts, is identical with that of *Flint v. Day*, except that Day signed without any express request from any one, and expressly declared at the time that he did it upon the credit and for the honor of Flint. I have thought for many years that that case might, with great propriety, have been ruled for the defendant upon the facts.

But in the present case, nothing of the kind appears, unless the law gives some artificial force to the mere order of indorsement. If this were a settled rule of the law merchant, we should of course presume the parties acted upon such an expectation. And whether the rule were known to the court or not, if it were clearly shown to be a settled rule among merchants and business men, it could be proved as a matter of fact to the jury, and would have the force of law. Most of the rules of the law merchant have grown up in that way, by the course of business and the practice of merchants, and when the rule becomes, by common consent, altogether uniform, it acquires the force of law, and is adopted by the courts, through the agency of special juries of merchants, in England, more often perhaps.

But that is not claimed in the present case. But it is claimed that the decisions of the courts show such an inclination in that direction that it should be regarded as law, that successive indorsements made at the same time, before the paper ever goes into circulation, and for the purpose of giving it its first start, so to speak, and all for the accommodation of the drawer, are to be regarded in the same light as if they had been made in the due course of business, the bill actually passing from hand to hand for value; that is, in the same light as to the rights of these several indorsers among themselves. Now, since it is admitted that a different rule does obtain in some of the states, and no such rule has ever been adopted in this state or at common law, it would be wonderful if all the parties to this bill so understood the matter among themselves, at the time of its discount; for it is, after all, mere paper for discount at the bank.

But it must be admitted, we think, that had the plaintiff taken the bill and paid the money for it, when the bank refused to discount it, and indorsed it in order to obtain the money upon it, he could, upon being compelled to take it up, have

gone against the defendants for the full amount. That was the legal import of the defendants' undertaking. And the bank refusing to take it, and the plaintiff knowing the defendants were mere accommodation indorsers, it would not have precluded him from the common rights of an indorser had he taken the bill and passed it in the ordinary way. This must be regarded as undeniable, I think, upon common principles, and expressly within the principle of the case of *Bank of Burlington v. Beach*, 1 Aik. 62. And it is claimed, upon the American decisions, that the court should so hold in the present case.

It is admitted that the case of *Douglas v. Waddle*, 1 Ohio, 413 [13 Am. Dec. 630], is an authority or a decision in favor of holding the plaintiff and defendants as co-sureties.

Upon the other side, *Brown v. Mott*, 7 Johns. 361, is relied upon; and it seems to me to be very much the same case as the present. The court seem to beg the question, however, in the opinion, taking it for granted that the plaintiff's rights are the same as if he had himself taken the bill and paid the value of it in the due course of business. They then ask whether he could recover against a prior indorser, whom he knew to have indorsed for the accommodation of the drawer, which, in my judgment, is not the question, and is in fact no question at all. The question of co-suretyship does not seem to be raised in the case. *McDonald v. Magruder*, 3 Pet. 470, seems in principle much the same case as the present; and Chief Justice Marshall discusses the question of co-suretyship, but seems to consider that there should have been some communication between the parties to constitute that relation, under the circumstances. Chief Justice Marshall says, if such is the contract, the parties, although signing as successive indorsers, will be regarded as co-sureties; thus treating the obligation as resting in oral proof. But he considers that, in the absence of proof, it is to be considered that the second indorser has the same rights against the first as if he took the bill in the due course of business.

But that is the question; and we can see no good reason for that rule in this case more than in every other case, where the parties for convenience consent to change positions with each other to enable the party accommodated to gain credit, as is very common where the real surety assumes the position of the debtor and gives the principal debtor the benefit of appearing as a mere surety. We think it better to call things by their right names. Such indorsers are in fact mere sureties, and any number of them

who sign for the same object, without much regard to priority, perhaps, should be regarded as co-sureties. And none of the recent cases regard it as of any importance that there should have been any communication between the sureties. All that is necessary is that they should have undertaken for the same thing, either by the same or separate instruments. In the present case the undertaking was that the Boyntons should pay the money. *Church v. Barlow*, 9 Pick. 547, seems to me to be the very case before the court, and was decided upon the ground that such a note or bill is entitled to be treated in all respects as a business note, even between the successive indorsers, who signed at the same time and before the note took effect virtually. And so also the case of *McDonald v. Magruder*, with this difference, that Magruder was all along upon Turner's paper, until his co-indorser had left and the paper been protested, and then McDonald comes in as a second indorser to obtain an accommodation for Magruder's relief, which last note was in the same manner renewed several times, Magruder always signing first. These circumstances tend very strongly to show an understanding that McDonald should only stand as a guarantor of the sufficiency of all the prior parties. But here the relative position is reversed, and the one who takes the real benefit of the discount is the last indorser, and claims to recover the whole amount of a mere surety who indorsed for mere accommodation and derived no benefit whatever from the discount. If the defendants had been the second indorsers in this case, it would alter the case, in its equitable aspect, very materially.

And in none of the cases cited, which we have had an opportunity of examining, has the person ultimately benefited by the discount stood as last indorser, and claimed and obtained indemnity against the prior mere accommodation indorsers upon the ground only of juxtaposition upon the paper. And without some communication between the parties, or some facts in the case making a show of justice in the plaintiff's claim, we think he can at most only claim to stand as co-surety. The case of *Brown v. Mott* is most like the present in regard to the equitable rights of the plaintiff. And while we admit that one who, under similar circumstances, takes a bill and advances the money in the due course of business, or passes it to the credit of the holder, may go-against all the prior parties, and also that one who indorses a bill after it is in circulation, for the honor of the drawer, must be entitled to indemnity against the prior parties, as a general rule, perhaps; yet it seems to us, that where differ-

ent persons successively indorse paper of this character, for the mere purpose of obtaining a discount for one of the parties, and before the paper ever goes into circulation, they should *prima facie* be held to have undertaken for the same thing; that is, that the person obtaining the discount shall repay it, and if not, that upon proper demand and notice, they will undertake either jointly or severally that they will pay it. In either case, as among themselves, they will be holden as co-sureties only. Of course it is understood that any *bona fide* holder of the bill or note may go against the prior parties, in the order in which they stand, without regard to the mode in which the paper was put in existence; and his knowing these facts before he takes the paper will make no difference. The undertaking of the parties is that, as to any holder of the paper for value, they will stand liable, the same as upon paper negotiated in the due course of business. But this implication does not necessarily control their relations to each other. And under the circumstances of this case, unless it can be shown very clearly that the defendants consented to assume the entire burden of prior indorsers, as between themselves and the plaintiff, the plaintiff ought to be content to stand on the same footing with them.

I should infer, from the note of cases in the United States Digest, that the rule contended for by the plaintiff has been adopted in most of the American states where the question has arisen; but under what circumstances it is impossible to say, without a full examination of the reported cases, which we have not seen. But all the cases, where the question has been raised, seem to recognize the rule that oral evidence may be introduced to show the understanding of the parties as to their liability to each other. The only difference between that rule and the one we here adopt is, that they regard the mere order of indorsement as imposing a *prima facie* obligation among themselves, the same as would have existed had the bill passed from hand to hand in the common course of business; while we hold that, as between accommodation indorsers, who all sign before the note or bill is put in circulation, and at the request of the person for whose benefit it is made, and to give him credit, the order of the indorsement raises no presumption of any obligation among themselves different from what grows out of the other facts in the case; in short, that it is of no importance either way.

It seems to us, too, that such a rule as that contended for by the plaintiff is liable to the very greatest abuse, to purposes of

fraud and injustice. It is a kind of obligation which, we believe, would not be so understood by one person in a thousand throughout the state.

Judgment reversed and case remanded.

ACCOMMODATION INDORSERS ARE CO-SURETIES AND ENTITLED TO CONTRIBUTION AS AMONG THEMSELVES: *Daniel v. McRae*, 11 Am. Dec. 787, and note; *Douglas v. Waddle*, 13 Id. 630; but see *Knox v. Dixon*, 23 Id. 488; *Aiken v. Barkley*, 42 Id. 397, and note; *Bank of U. S. v. Beirne*, Id. 551; and an accommodation indorser or acceptor is to be regarded as surety for the principal debtor on a note or bill, as to all persons having notice: *Pitt v. Congdon*, 51 Id. 299; but an agreement that one who indorses a note for the maker's accommodation shall be liable only as a second indorser will not limit his liability to the payee as principal: *Nash v. Skinner*, 36 Id. 338. In *Sweet v. McAllister*, 4 Allen, 355, it was held that where the plaintiff was applied to by a third person for assistance in raising money, and he agreed to indorse a note on condition that the defendant would indorse it, this imported that the plaintiff would assist the third person as second indorser; and when the note was renewed, by the defendant signing as surety for the third person and another, and indorsed by the plaintiff, this act did not import an agreement of joint liability between the plaintiff and the defendant; the court saying: "The case of *Pitkin v. Flanagan*, 23 Vt. 160, is cited as sustaining a contrary doctrine. Some of its *dicta* may seem to do this, but the case itself differs from the present case." See the principal case cited in *Adams v. Flanagan*, 36 Id. 409, as questioning *Flint v. Day*, 9 Id. 345.

ACCOMMODATION INDORSERS', MAKERS', AND ACCEPTORS' RIGHTS AND LIABILITIES IN GENERAL: See the cases collected in the note to *Pitt v. Congdon*, 51 Am. Dec. 299.

FARMERS' AND MECHANICS' BANK v. CHAMPLAIN TRANSPORTATION COMPANY.

[23 VERMONT, 186.]

CORPORATION'S POWERS AS COMMON CARRIER EXTEND TO CARRYING BANK BILLS, when constituted by its charter for the purpose of transporting goods, wares, and merchandise, and "all other articles and things usually transported by water" upon a certain lake, it appearing that bank bills were usually carried by water-craft upon such lake at the time the corporation went into operation; but it is not thereby *ipso facto* constituted a common carrier of bank bills, so as to prevent it from confining its business to carrying other dissimilar commodities.

COMMON CARRIER CORPORATION IS PRIMA FACIE LIABLE FOR ALL CONTRACTS FOR CARRYING made by captains of its boats, or other general agents, within the corporation's powers, and in an action for loss the *onus* rests upon it to show that a private contract was made with a captain, or credit given to him exclusively; and it is not incumbent upon the plaintiff to positively prove the corporation's consent to the captain's carrying bank bills on their account, when its charter extends to the carrying of such commodities.

COMMON CARRIER IS NOT EXONERATED FROM LIABILITY FOR LOSS by the mere fact that it permitted its agent to take the perquisites of carrying the lost parcels.

COMMON CARRIER'S COMMON-LAW RESPONSIBILITY CAN NOT BE LIMITED by mere general notices, when brought to the knowledge of the owner of goods carried, unless there is very clear proof that the latter expressly assented to them as forming the basis of the contract; but the carrier may thus limit his responsibility for carrying commodities beyond the line of his general business, or may make his responsibility depend upon reasonable conditions.

EVIDENCE OF INTENTION OF OWNER'S AGENT TO DELIVER PACKAGE TO CARRIER'S AGENT in his official and not in his private capacity is inadmissible to charge the carrier with its loss, when not in any way made apparent to others at the time.

COMMON CARRIERS ARE BOUND TO KEEP GOODS REASONABLE TIME AFTER NOTICE TO CONSIGNEES of their arrival, if it be incumbent upon them to so notify.

POSITIVE EVIDENCE PREFONDERATES OVER NEGATIVE in weighing contradictory testimony, other things being equal; but the jury's attention, in the application of this rule, should be directed to the facts and circumstances of the case, to prevent its unjust operation.

RESPONSIBILITY OF COMMON CARRIER BY WATER CEASES AND TRANSIT ENDS when the goods are delivered into the custody of the wharfinger upon the wharf, in the due course of business, unless there is usage to the contrary, and unless the carrier has expressly or by fair implication undertaken to do something more; and the question of time and place when the carrier's duty ends is one of contract, to be determined by the jury from the various attending circumstances.

TRESPASS on the case against the defendants, a corporation, as common carriers upon Lake Champlain, for the loss of a package of bank bills. The case as it first came before the court is reported in *Farmers' and Mechanics' Bank v. Champlain Transportation Company*, 42 Am. Dec. 491. The package in question, addressed to "Richard Yates, Esq., cashier, Plattsburgh, New York," had been delivered at Burlington by the teller of the plaintiffs' bank, one Seymour, to Phillips, the captain of one of the defendants' boats, and it was by the latter carried and delivered to Ladd, the wharfinger at Plattsburgh, from whose desk it was stolen. Ladd received the package from Phillips to carry to the bank, without compensation—he and Phillips being in the habit of exchanging favors; and on seeing the cashier in Plattsburgh on the same day, Ladd told him that a package had been left for the bank, and that he would ride down to the wharf and get it; but on arriving there Ladd found the package gone. Seymour's testimony tended to show that Phillips had assented to deliver the package at the Clinton County Bank at Plattsburgh, or to Yates, its cashier, and that he had paid

Phillips fifty cents charges; and he also testified, against the defendants' objections, that he intrusted the package to Phillips in his official and not in his private capacity; but Phillips, on the other hand, testified that he did not engage to deliver the package at the bank or to Yates, but that his practice was to leave such packages with the wharfinger, of which fact he had previously informed the plaintiffs' cashier, and also the president and one of the directors of the plaintiffs' bank, who was also a director in the plaintiffs' company; and that moneys received by him for carrying such packages he applied to his own private use, with the knowledge of such director, but there had been no agreement between him and the defendants respecting these perquisites. A part of a handbill issued and distributed with others by the defendants a short time before the loss of the package was admitted and read in evidence on behalf of the plaintiffs, against the defendants' objections, it appearing that the remainder had been accidentally destroyed or lost, and that no other copy could be found; and was to the effect that the defendants would not be accountable for "baggage, merchandise, specie, bank bills, or for any description of property whatsoever, unless the same is delivered into the hands of the respective captains or clerks, and a regular bill of lading executed therefor." The lost portion of the handbill was shown to contain only the names of the boats, their captains, and the time of departure. Conflicting evidence was given by the plaintiffs and defendants as to the usage which prevailed in regard to delivering packages of bank bills: the plaintiffs' evidence showing that it was the custom to deliver such packages to the consignees, and not to the wharfingers; and the defendants showing that the contrary was the case when the boats did not stop long enough to make a personal delivery to the consignee, and when they did, it was the custom to deliver the packages either personally or to the wharfingers, without giving the consignees notice. There was also evidence to show that previous to the defendants' act of incorporation, the craft sailing on the lake had been in the habit of transporting bank bills. The jury were instructed as follows: That the defendants were as much common carriers of bank bills as of ordinary goods, wares, and merchandise, under their charter, which extended not only to the carrying of goods, wares, and merchandise, but to "all other articles and things usually transported by water" on the lake, it appearing that the craft which sailed on the lake had been and were in the habit of transporting bank bills, and the

fact that the defendants had been in the habit of transporting bank bills might be regarded as a practical construction by them of their charter; that if the package directed to the Clinton County Bank, or to its cashier, was received and assumed to be carried for hire by the defendants, in the absence of a contract or usage to the contrary, they were bound to deliver it to the consignee personally, or if delivered to the wharfinger, the consignee must be notified, and until this was done they remained liable as common carriers, although the bills were stolen from the wharfinger, and an excuse for not delivering the package at its destination was not furnished by the fact that the boat did not stop long enough to go to the bank and return; that it was to be determined whether the captain acted as agent or individually—the company not being liable if he acted in the latter capacity—but it was presumed that he acted as agent; and the mere fact that he received the perquisites to his own use was not conclusive as to whom credit was given; but if the bank had or was chargeable with notice of this fact, it would tend to prove that credit was given to the captain individually; that the president of the bank had been told, however, of the fact by the captain was evidence of, though not of itself notice to the bank; that if the defendants undertook to carry the package for hire, although their agent was allowed to appropriate the hire to his own use, they were liable for not delivering it at its destination, unless they were allowed by usage to deliver it to the wharfinger, in which case their liability ended; but the usage which should be established must be uniform, well settled, and notorious; usage, however, could not be set up in contradiction of an express agreement, and whether there was an express agreement depended upon the testimony of Seymour and Phillips, and in weighing contradictory testimony positive evidence preponderated over negative, other things being equal; that it was a question of fact whose agent the wharfinger was; that the non-delivery of a bill of lading of the package did not exonerate the defendants from liability, it being the neglect of their agent; and besides, there was no evidence to show that the plaintiffs had any actual notice of this requirement through the advertisement. Verdict for the plaintiffs, and exceptions by the defendants.

C. Adams and D. A. Smalley, for the defendants.

C. D. Kasson and A. Peck, for the plaintiffs.

By Court, REDFIELD, J. The facts necessary to a full under-

standing of the points now determined by the court will be found sufficiently detailed in the reports of the same case: 16 Vt. 52 [42 Am. Dec. 491], and 18 Id. 131.

The first question is, What was necessary to constitute the defendants common carriers of bank bills?

The defendants' charter extends to the carrying of all commodities usually carried upon Lake Champlain at the date of the charter, and the proof showed that bank bills were usually carried by the water-craft upon that lake at the time the defendants' company took their charter and went into operation. The words of the charter are: "All other articles and things usually transported by water on said Lake Champlain." This being so, there could be no doubt the defendants' powers, as a corporation, extended to carrying bank bills. And something in the bill of exceptions looks as if the jury were told that this did, *ipso facto* and of necessity, constitute the defendants common carriers of bank bills. But this general proposition we do not think exactly maintainable. For the powers of natural persons, who should erect steamboats and become carriers upon Lake Champlain, would be equally extensive with those of the defendants; but if they should confine their business to carrying other dissimilar commodities, we do not think they could be compelled to assume the risk of carrying bank bills or specie. And so the court, in this case, seemed to have viewed the subject in another portion of their charge, when they allude to the practice of this company, in carrying bank bills, as a practical construction of their own charter, and of their own obligations to the public under it. But it seems to us that this case is distinguishable from those where it has been held incumbent upon the plaintiffs to show, by positive proof, that the company consented to the captain of their boat carrying money on their account, in order to hold the company responsible for the loss of the money. *Sewall v. Allen*, 6 Wend. 351, reversing the judgment in *Allen v. Sewall*, 2 Id. 327, is one of that class of cases, so far as the determination of the court of errors is concerned. And that determination seems to meet with approbation in Angell on Carriers, sec. 101, and note 4. And Story, J., in *Citizens' Bank v. Nantucket S. B. Co.*, 2 Story, 16, and Chancellor Kent, 2 Kent's Com. 609, seem also to approve the decision of the court of errors. But these cases, and the writers named, adopt this view of the subject upon the ground that the charter of the company limits their business to the carrying of "goods, wares, and merchandise," and that bank bills are neither, and so the company

prima facie are not liable; and not liable in any event, unless they have given their consent to their proper business being enlarged, so as to include bank bills; and also that this was a suit against the stockholders in their individual capacity, under the charter. Upon this narrow view of that case the decision of the court of errors may stand; but as applicable to a company whose charter, on the face of it, does include the carrying of bank bills, and in a suit directly against the corporation, it seems to us the reasoning is altogether unsatisfactory and unsound. And unless that case is to be distinguished from the present, upon the ground of the restricted nature of the charter of that company, we should certainly incline to the opinion of the supreme court of New York in *Allen v. Sewall*, rather than that of the court of errors. Mr. Justice Story (in 2 Story, *ut supra*) seems to admit that, upon general principles, the captain's contract will bind the company to the extent of the charter powers.

It seems to us that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain and other agents to take the entire control of their boat, and thus enter upon the carrying business from port to port, they do constitute the captain their general agent to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so, it would form a wonderful exception to the general law of agency, and one in which the public would not very readily acquiesce. There is hardly any business in the country where it is so important to maintain the authority of agents as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence or power of action except through these same agents, by whom almost the entire carrying business of the country is now conducted. If, then, the captains of these boats are to be regarded as the general agents of the owners—and we hardly conceive how it can be regarded otherwise—whatever commodities, within the limits of the powers of the owners, the captains, as their general agents, assume to carry for hire, the liability of the owners as carriers is thereby fixed, and they will be held responsible for all losses, unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry might have learned, that the captains were intrusted with no such authority. *Prima facie* the owners are liable for all contracts for carrying, made by the captains or other general agents for that purpose,

within the powers of the owners themselves, and the *onus* rests upon them to show that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain: *Butler v. Basing*, 2 Car. & P. 614.

But it does not appear to us that the mere fact that the captain was, by the company, permitted to take the perquisites of carrying these parcels will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves. But we are aware that the question, with whom was the contract, and to whom the credit was given, will generally be one to some extent of fact. Yet it seems to us that the defendants have no ground of complaint with the general mode in which this part of the case was disposed of in the court below. The law would have justified the judge, as we have before stated, in putting the case, upon this point, upon grounds far more unfavorable to them. Indeed, it seems to us that, upon the facts stated, if we are not misinformed in regard to the general nature of the defendants' character, there could be very little ground to raise any question, either of law or fact, as to the defendants' liability as common carriers of the parcel, so far as they undertook to carry it.

As to the notice, which was attempted to be proved, we do not see but the proof of the loss of the remainder of the handbill was sufficient. We are more inclined to adopt the view which the American cases have taken of this subject of notices by common carriers, intended to qualify their responsibility, than that of the English courts, which they have in some instances subsequently regretted. The consideration that carriers are bound, at all events, to carry such parcels within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others who have an option in regard to work which they undertake. In the former case, the contractor having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands as arises in those cases where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear that persons contracting with common carriers expressly consent to be bound by the

terms of such notices, it does not appear to us that such acquiescence ought to be inferred.

But if by the terms of the contract the risk is in part or wholly assumed by the owner of the things carried, the carrier would only be liable, probably, for ordinary neglect. The law of this subject will be found fully discussed in Mr. Angell's chapter upon this subject, section 232 et seq.; see also *Id.*, sec. 220 et seq. It is certain from the English cases that since the time of *Southcote's Case*, 4 Co. 83, it has always been considered that any bailee might by express contract either increase or limit his common-law responsibility. And such is the general current of the American decisions out of New York. The cases of *Clarke v. Faxton*, 21 Wend. 153; *Hollister v. Nowlen*, 19 Id. 234 [32 Am. Dec. 455]; and *Cole v. Goodwin*, Id. 251 [32 Am. Dec. 470], have undoubtedly settled the law in that state, that it is not competent for a carrier to limit his responsibility by a notice brought home to the owner of the goods at the time of delivery to such carrier; and these cases seem to assume the ground that it is not competent for the carrier to so limit his responsibility, even by an express contract to that effect—which we certainly should not regard as law. This express contract ought, perhaps, to be very clearly proved, and in water carriage is usually required to appear in the bill of lading. But a mere general notice, when brought to the knowledge of the owner, ought not, perhaps, to have that effect, unless there is very clear proof that the owner expressly assented to that as forming the basis of the contract. But we regard it as well settled that the carrier may by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid beyond the mere expense of carriage: Angell on Carriers, sec. 245; 2 Greenl. Ev. 215; *Orange County Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129]. But all this seems to us to have but a remote bearing upon the present case, as the notice which was shown had no reference to this particular boat, and is not shown clearly to have been brought home to the knowledge of the plaintiff's agent at the time of delivering the parcel; and there is not the slightest evidence of any assent upon his part to its terms, but the contrary is fully shown by the testimony of the captain.

The testimony of the teller, as to his purpose and intention at the time of delivery of the parcel, not in any way made apparent to others, we should not regard as of any legal importance towards the proof of the contract; and it does not very clearly appear that it was intended to have any effect upon the case, or did have any effect, unless, possibly, to preclude one ground of inferential argument on the part of the defendants; and it is not, in the course of jury trials, considered competent to introduce distinct evidence to block up every possible avenue to argument. Such a rule would render trials almost literally endless. But from the view already taken of this portion of the case, perhaps this testimony would be regarded as of less importance in a future trial. At all events, we think it is not strictly admissible. The true remedy in such cases is, undoubtedly, where the judge has good ground to apprehend that the jury may have been misled from the true points in issue in the case, by the argument of counsel, or in any other way, to set them right in the charge. And sensible lawyers never complain, when all the false issues on both sides are uniformly swept out of all cases, and under such rules of trial they feel no disposition to build up shadows, or to beat them down, but rather save their breath for more important matters; and this course undoubtedly brings a far greater proportion of the cases to a correct determination by juries than where the counsel are permitted to contest every possible point, from the origin of matter to the last discovery in mechanics, without any intimation to the jury by the court that such things are rather matters of curious speculation than anything else.

It is in vain, we think, to make this a case where notice to the consignee was required, or if given could have availed anything. At all events, the notice which was given after the parcel had been lost is, according to all the cases, of no avail. For if it was incumbent upon the defendants to give notice, they were bound also to keep the parcel a reasonable time after the notice came to the consignee, to enable him to come and receive it. All the cases, and all the elementary writers, so far as I know, agree in this. So that the very fact of the defendants claiming that the notice which was given should avail them, is a virtual admission of their liability up to that time as carriers, which is sufficient to charge them in the action. But this seems to have been merely thrown out as a plank in shipwreck, without much consideration, and from which no certain benefit was expected.

What was said to the jury, in regard to the comparative importance of positive and negative testimony, is most undoubted law; and yet, if that was said, and nothing more, it is apparent it might have operated unjustly against the defendants. It would, somewhat naturally, have led the jury to conclude that the case ought to be determined, perhaps, upon the testimony of Seymour; when in fact it is not very apparent, under the circumstances of the case, how Seymour or Phillips should have known, with much certainty, precisely what was said, or was not said, at the time of the delivery and acceptance of the parcel; and it is more than probable now, that either the one or the other may very honestly testify to his mental conclusions at the time as positive declarations or denials. But we are perhaps to suppose that all this was fairly brought to the mind of the jury, together with the very strong improbability that any special contract, in terms, should have been made at the time, if the same captain was in the constant practice of carrying similar parcels to the same place for the same bank, and his practice in regard to the delivery to the wharfinger was made known to the plaintiffs and not objected to by them, as testified by Phillips—thus making his testimony in one view almost as truly positive as that of Seymour, but in a manner not so obviously so perhaps.

The only difficulty which the court, from the first, have ever felt in this case has been in regard to the extent of the defendants' undertaking to convey the parcel; in other words, as to the extent and termination of the transit or carriage by the defendants. The county court, in the trial of this case, seem to have assumed that in the law of carriers there was a general, well-defined rule upon this subject, and that the defendants were attempting to escape from its operation by means of some local usage or custom, in contravention of the general rules of law upon the subject. In this view of the case, the defendants were justly held to great strictness in the proof of the usage. It becomes, therefore, of chief importance to determine how far there is any such general rule of law as that which is assumed in the decision of the case in the court below. If the law fixes the extent of the contract in every instance, in the manner assumed, then most undoubtedly are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of

business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself.

There is no doubt, from the history of the carrying business in England until a late period, that the carriers employed their own porters to deliver their parcels at the several stopping places on the route. A common carrier by land was then in that country of a distinct, well-known, and well-defined class of men, almost as much so as any public officer. And their character, responsibility, and course of business being well settled and well known, those who dealt with them acted upon the faith of their making a personal delivery of their parcels at their several stopping places. *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R. 389, is decided upon this ground, and upon the additional fact that the carriers charged for cartage to the house of the consignee, thus showing that they so understood the contract. *Stephenson v. Hart*, 4 Bing. 476, assumes the same general rule as applicable to carriers by land. But in this case it was considered a fair inquiry for the jury, "whether the defendants had delivered the box according to the due course of their business as carriers." There is also a class of cases where the carrier has been held liable in trover as for a tort for delivery to a wrong person. *Duff v. Budd*, 3 Brod. & B. 177, is of this number. But in this case it was held to be matter of fact for the jury whether the defendant was guilty of negligence.

But this class of carriers (by land and with wagons), it must be borne in mind, is the very extreme case in the books, where the obligation to a personal delivery is held. And here even that rule is not regarded as altogether uniform and matter of course, but only the natural inference in the absence of proof to the contrary. But this rule of law, if it may be called so, has never been applied to stage-coach proprietors, even those who carry parcels in this country, or certainly not uniformly. *Gibson v. Culver*, 17 Wend. 305, decides that in such case the obligation of the carrier only extends to the delivery of the parcels, according to the course of his business, at his usual stopping places.

There has been an attempt to push one department of the law of carriers into an absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make a personal delivery. That is, by holding the first carrier, upon a route consisting of a succession of carriers, liable for the safe

delivery of all articles at their ultimate destination. *Muschamp v. Lancaster & P. Railway Co.*, 8 Mee. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, by the court, put upon the ground of the particular contract in the case; and also that "all convenience is" in favor of such a rule, "and there is no authority against it," as said by Baron Rolfe, in giving judgment. *St. John v. Van Santvoord*, 25 Wend. 660, assumed similar ground. But this court, in *Farmers' etc. Bank v. Champlain T. Co.*, 16 Vt. 52 [42 Am. Dec. 491], did not consider that decision as sound law or good sense; and it has since been reversed in the court of errors: *Van Santvoord v. St. John*, 6 Hill, 158; and this last decision is expressly recognized by this court: *Farmers' & M. Bank v. Champlain T. Co.*, 18 Vt. 131. *Weed v. Schenectady & Saratoga etc. R. R. Co.*, 19 Wend. 534, is considered by many as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon this subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies constituting the entire route, and also that the first carriers took pay and gave a ticket through, which is most relied upon by the court. But see opinion of Walworth, Chancellor, in *Van Santvoord v. St. John*, 6 Hill, 158. And in such cases, where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The case of *Bennett v. Filyaw*, 1 Fla. 403, is referred to in Angell on Carriers, sec. 95, note 1, as favoring this view of the subject.

The rule laid down in *Garside v. Trent & M. Nav. Co.*, 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject: *Ackley v. Kellogg*, 8 Cow. 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal-boat at that place and forwarded to the north, and the goods were lost by the upsetting of the canal-boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon this subject, with the exception of those above referred to; one of which, *Muschamp v. Lancaster etc. Railway Co.*, 8 Mee. & W. 421, considers it chiefly a matter of fact to be determined

by the jury, as to the extent of the undertaking; one, *St. John v. Van Santvoord*, 25 Wend. 660, has been disregarded by this court, and reversed by their own court of errors: *Van Santvoord v. St. John*, 6 Hill, 158; one, *Hollister v. Nowlen*, 19 Wend. 234 [32 Am. Dec. 455], is the case of ticketing through upon connected lines; and one, *Bennett v. Filyaw*, 1 Fla. 403, I have not seen.

But the rule of law and the course of business, in regard to carriage by water, have always been considered different from land carriage. In regard to foreign carriage, it is perfectly well settled that a delivery at the wharf, even without notice, unless there be some special undertaking in the bill of lading, is sufficient. The consignee is presumed to have received, from his correspondent, a copy of the bill of lading, and he is bound to take notice of the time of the arrival of the ship: *Cope v. Cordova*, 1 Rawle, 203; Angell on Carriers, secs. 312, 313, et seq.; 2 Kent's Com. 604, 605, and notes. The cases are all one way in regard to foreign carriers by water upon this point.

But a distinction is attempted in most of the cases between the foreign and the internal and coasting carrying business, in regard to the delivery or landing upon the wharf being sufficient to exonerate the carrier. *Ostrander v. Brown*, 15 Johns. 39 [8 Am. Dec. 211], holds that such a deposit is not sufficient. The carrier must continue his custody till the consignee has had sufficient time after the landing of the goods and notice to him to come and take them away. After that the carrier may put them in storage. But we apprehend the rule here laid down will be found to have been very essentially qualified by the course of business and the decisions since that time. The steamboats and railways now almost monopolize the carrying business. And the largest amount is perhaps already in this section of the country done by railways. Their course of doing the business is, as is well known, to build storehouses of their own at all the stations, and upon the arrival of the goods put them immediately in storage without giving notice to any one. In *Thomas v. The Boston and Prov. R. R. Corp.*, 10 Met. 472 [43 Am. Dec. 444], it is clearly shown that the carrier was not liable as such after the goods were put in storage. And this decision seems to us to rest upon the most satisfactory grounds.

And in regard to water carriers, a somewhat similar course is, almost of necessity, now pursued. The rapidity of the operations and the vast amount of business necessary to be done upon these great thoroughfares almost absolutely preclude the possibility

of securing a personal delivery or notice to the consignee, without a most disproportionate increase of the expense of freight, which the owners do not wish to incur. It would, then, as it seems to us, be most unjust and unreasonable to require this labor to be performed by carriers without compensation. When the water carrying business at a particular point is in the hands of one company exclusively, there is no reason to doubt that they might erect their own storehouses and conduct the business much as the railway companies do. But this is seldom the case. And the owners of the wharves usually erect their own storehouses, and appoint some one to take charge of goods and parcels delivered at their wharf by the different water craft. This person, denominated the wharfinger, is as much a public person as the carrier himself; and when the carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger upon the wharf, we have no doubt, unless there is some practice or usage to the contrary, the transit is ended, and his responsibility as carrier ceases. That was so considered by this court, in *Sawyer v. Joslin*, 20 Vt. 172 [49 Am. Dec. 768], in a case where every member of the court considered that the justice of the case required the transit to be prolonged to its utmost legal extension. And still we felt compelled to say, that upon the delivery upon the wharf, where the consignee was accustomed to receive his goods, the transit was at an end, and the goods, in contemplation of law, had reached the consignee.

The case of *Chickering v. Fowler*, 4 Pick. 371, shows that a delivery at the wharf, in the due course of business, is a delivery to the consignee. *Quiggin v. Duff*, 1 Mee. & W. 174, and *Packard v. Getman*, 6 Cow. 757 [16 Am. Dec. 475], indirectly favor the same view of the subject. And all the cases, almost without exception, regard the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury, from a consideration of all that was said by either party, at the time of the delivery and acceptance of the parcels by the carriers, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties.

The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to

deliver the parcel to the wharfinger. If not, then that was the contract, and that ended their responsibility, and the plaintiffs can not complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have, either expressly or by fair implication, undertaken, on their part, to do something more than deliver the parcel to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that from the circumstance attending the delivery, or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise it seems to us the case is with the defendants.

This was the view taken of this case when it first came before this court, and distinctly expressed, as we supposed, by the learned chief justice, who then said: "But when it is understood, by the contracting parties, that the carrier is to deliver them to another [that is, the wharfinger], or at a certain place [that is, the wharf], the duty of the carrier terminates at that particular place; and the responsibility ceases on the delivery, at that place, to and the receipt by any person authorized there to receive them." And the same is substantially reaffirmed by the learned judge who delivered the opinion of this court in *Farmers' & Mechanics' Bank v. Champlain T. Co.*, 18 Vt. 131.

A great deal more might be said, undoubtedly, in regard to the just ground of expectation in the present case, that the defendants would make a personal delivery at the bank, aside from any special contract to that effect. It is true, the parcel was a valuable one, but one like others constantly carried on the same route, as it would seem. The plaintiffs had no right to expect the defendants to delay their boat sufficient time to go to the bank, if the usual course was merely to touch at the wharf sufficient time to unload and load passengers and freight. The claim that the defendants should delay sufficient time to make a personal delivery of this parcel implies also that they should do the same as to all their freight, which might take, in some instances, perhaps a large portion of the day. Then, as to their taking the responsibility of the faithfulness of the wharfinger, we see no reason in it whatever, unless they so contracted to do, any more than that they should be bound for the safe delivery of all their freight at its ultimate destination, however

remote. This is a risk which, in the absence of all contract, should naturally and justly fall upon the plaintiffs, for whose benefit the wharfinger was acting.

It might be consoling to the carriers and to others if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances as to steamboat carriage, that is impossible. There will usually be, at every place, some fixed course of doing the business, which will be reasonable, or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making.

The fact that the wharfinger made no charge to any one for delivering these parcels, and that he expected similar favors from the steamboat captain in return, so to speak, does not seem to us decisive at all upon the question of the undertaking of the defendants, although no doubt entitled to consideration in connection with the other facts. If he had made a charge, he might have demanded it upon the delivery of the parcel; or if the captain of the boat had actually received the whole freight in advance, expecting to pay a portion to the wharfinger, it would certainly not be decisive as to the termination of the liability of the carrier as such. On most of our routes it is common sometimes to take pay in advance, even beyond the first route. And in such cases, where there is no connection between the two routes in the way of business, if the first carrier delivers his parcel, at the end of his route, to the next carrier, and pays him what remains of the advance pay, he is no doubt exonerated. But it does seem to us that this portion of the case makes more strongly in favor of the plaintiffs than anything else in the case at present.

Judgment reversed; and case remanded.

Several of the citations of the principal case are given in the notes to *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 42 Am. Dec. 491, but for the sake of convenience they will be repeated here in appropriate references. The opinion of Redfield, J., in the principal case will be found re-reported in 2 Redf. Am. Railw. Cas. 52.

CORPORATION'S POWERS AS COMMON CARRIER UNDER CHARTER.—The principal case is cited in *Michigan etc. R. R. v. McDonough*, 21 Mich. 196, to the point that companies incorporated under charters which simply permit

but do not require them to undertake the business of common carriers, become such as to any particular kind of property (though such as comes within all the reasons of the law of carriers), or as to any particular portion of their route, only so far as they hold themselves out as such, and are under no obligations to carry otherwise, or other kinds of property, than they publicly profess to carry; and see *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 42 Am. Dec. 491; *Knox v. Rives*, 48 Id. 97.

COMMON CARRIER, WHEN SUCH, OF BANK BILLS: *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 42 Am. Dec. 491; *Knox v. Rives*, 48 Id. 97.

COMMON CARRIER'S RESPONSIBILITY FOR ITS AGENT'S CONTRACTS FOR CARRYING: See *Reynolds v. Toppan*, 8 Am. Dec. 110; *Ward v. Green*, 16 Id. 437; *Keene v. Lizardi*, 26 Id. 478; *McClure v. Richardson*, 33 Id. 105; *Kelly v. Benedict*, 39 Id. 530; *Mayall v. Boston & M. R. R.*, 49 Id. 149.

COMMON CARRIER'S LIABILITY WHETHER AFFECTED BY ITS SERVANT APPROPRIATING MONEY RECEIVED FOR CARRYING: See *Mayall v. Boston & M. R. R.*, 49 Am. Dec. 149; *Bean v. Sturtevant*, 28 Id. 389.

COMMON CARRIER'S POWER TO LIMIT LIABILITY BY NOTICE: See *Cole v. Goodwin*, 32 Am. Dec. 470, and note discussing the question; *Hollister v. Nowlen*, Id. 455, and note; *Hale v. New Jersey Steam Nav. Co.*, 39 Id. 398; *Logan v. Pontchartrain R. R.*, 43 Id. 199; *Fish v. Chapman*, 46 Id. 393; *Laing v. Colder*, 49 Id. 533. The principal case has been cited to the point that a mere general notice, when brought to the knowledge of the owner of goods carried, will not have the effect to limit a common carrier's common-law liability, unless it clearly appears that the owner expressly assented to that, as forming the basis of the contract, in *Western Transportation Co. v. Newhall*, 24 Ill. 470; *Oppenheimer v. U. S. Express Co.*, 69 Id. 67; *Judson v. Western R. R.*, 6 Allen, 492; but a common carrier may, by such notice, limit his responsibility for carrying certain commodities beyond the line of his general business, or may make his responsibility depend upon certain conditions, as having notice of the kind, quantity, value, etc., of the things delivered for carriage: *Earnest v. Express Co.*, 1 Woods, 578, quoting the principal case with approval.

COMMON CARRIER'S POWER TO LIMIT LIABILITY BY EXPRESS AGREEMENT: See *Atwood v. Reliance Transportation Co.*, 34 Am. Dec. 503; *Bingham v. Rogers*, 40 Id. 581; *Swindler v. Hilliard*, 45 Id. 732; *Sager v. Portsmouth etc. R. R.*, 50 Id. 659; note to *Cole v. Goodwin*, 32 Id. 495, where the subject is discussed at length.

COMMON CARRIER WHETHER BOUND TO NOTIFY CONSIGNEE OF ARRIVAL OF GOODS: The rule in 2 Redf. on Railw., sec. 175, that a carrier by railroad is not bound to notify the consignee of the arrival of the goods, to which the author cites the principal case, with others, is not regarded as settled in *Michigan etc. R. R. v. Bivens*, 13 Ind. 267, the court saying, by way of dictum, however, that "if these cases be considered as deciding the proposition, there are others which hold the other way."

TERMINATION OF COMMON CARRIER'S RESPONSIBILITY: See *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 42 Am. Dec. 491, and prior cases in note thereto; *Thomas v. Boston etc. R. R.*, 43 Id. 444; *Risk v. Newton*, Id. 649, and note; *Parker v. Flagg*, 45 Id. 101; *Sawyer v. Joslin*, 49 Id. 768; *Stone v. Waitt*, 52 Id. 621. A common carrier may make a valid contract to carry passengers and freight beyond the limits of its own road, and thus be responsible for the acts or neglects of other carriers: *Wheeler v. San Francisco etc. R.*

R., 31 Cal. 53; *Noyes v. Rutland & B. R. R.*, 27 Vt. 111, both citing the principal case; but where a carrier receives goods marked for a particular destination beyond its line, and does not expressly undertake to deliver them at the point designated, its implied contract, in the absence of usage to the contrary, is only to transport them over its own line, and forward them from its terminus: *McMillan v. Michigan etc. R. R.*, 16 Mich. 120; *Nutting v. Connecticut River R. R.*, 1 Gray, 505; *Darling v. Boston etc. R. R.*, 11 Allen, 297, 299; *Packard v. Taylor*, 35 Ark. 411; *Stewart v. Terre Haute etc. R. R.*, 1 McCrary, 314, all citing the principal case. Usage is an important element in determining when the transit ends. See *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 42 Am. Dec. 491, and cases in note thereto. In 2 Pars. on Con. *187, note, the principal case is quoted from and said to be one of the strongest cases in the books on the point that in determining what is a sufficient delivery of goods by a carrier to discharge him of liability, usage has great influence; and see this quotation in 2 Redf. on Railw., sec. 175. On this proposition the principal case has been cited in *Ouimit v. Henshaw*, 35 Vt. 619; *Blumenthal v. Brainerd*, 38 Id. 413; *Pittsburgh etc. R'y v. Nash*, 43 Ind. 427; *Illinois Cent. R. R. v. Copeland*, 24 Ill. 337; *Conway Bank v. American Express Co.*, 8 Allen, 515; *Darling v. Boston etc. R. R.*, 11 Id. 296; *Loveland v. Burke*, 120 Mass. 412; and in *Hooper v. Chicago etc. R'y*, 27 Wis. 92, the principal case and *Ouimit v. Henshaw*, 35 Vt. 619, *supra*, were said to be "valuable as showing the importance of the course of business or practice of the carrier in determining when the transit ends."

AFFIRMATIVE TESTIMONY OUTWEIGHS NEGATIVE, as a general rule: *Potts v. House*, 50 Am. Dec. 329.

TOWNE v. WILEY.

[23 VERMONT, 355.]

INFANT BAILEE IS LIABLE FOR CONVERSION when he departs from the object of the bailment, although so long as he keeps within its terms his infancy is a protection.

TROVER for a horse. The opinion states the facts.

Baxter and Stoughton, for the plaintiffs.

C. I. Walker and G. B. Kellogg, for the defendant.

By Court, REDFIELD, J. This is an action on the case, in trover, for the conversion of a certain horse. The facts which appeared on the trial were, that the defendant, being an infant of twenty years, hired of the plaintiffs, who were livery-stable keepers at Bellows Falls, the horse in question to go to Brattleborough and back the same day. He went to Brattleborough and returned by a circuitous route, nearly doubling the distance, which, in a direct course, is twenty-three miles; at about eight o'clock in the evening went to a house in Westminster, and remained until four o'clock the next morning, the night being

cool and windy, and the horse exposed during the whole night, without sheltering or covering of any kind. This was on the thirteenth of July, and the horse, when returned to the plaintiffs the next morning, was sick, ate nothing, and died in five or six days, from the overdriving and exposure. The court charged the jury that these facts constituted a conversion by the defendant, and that his infancy was no bar to the action, and that the plaintiffs were entitled to recover the value of the horse at the time of conversion, which would be when the defendant departed from the use for which he hired the beast.

The cases upon the subject of the liability of infants for torts, when viewed with reference to their facts, may not seem altogether consistent; but when the principle upon which the courts profess to proceed is examined, they will all be found to be placed upon the same ground; and no case is to be regarded as authority, except for the principle upon which the courts professed to proceed in deciding it. In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive substantial torts, but not for violations of contract merely, although by construction the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract, at his election. *Jennings v. Rundall*, 8 T. R. 335, was entirely of this character. The form of the action was trespass on the case, for immoderately driving a mare, let to hire by the plaintiff to the defendant, and trover for conversion. The defendant pleaded infancy to the counts for immoderately driving, and the plaintiff demurred; and Lord Kenyon, in giving judgment, speaks of the defendant as a lad. But in every view of the case, the defendant was guilty of a mere omission, a non-feasance, or breach of the implied contract, to use the beast discreetly and carefully, and he had judgment.

Bristow v. Eastman, 1 Esp. 172, was *assumpsit* for money had and received, and on trial it appeared that the defendant had obtained the money while in the plaintiff's employ by a substantial fraud, in making overcharges of expenditures on account of the plaintiff's business, and thus effecting a false settlement with the plaintiff. Lord Kenyon said, that although the action was in form *assumpsit*, it was in substance for a tort, and the plaintiff might have maintained trover, and gave judgment for the plaintiff.

Green v. Greenbank, 2 Marsh. 485, professes to go upon the same ground as the two last; but the facts here show more of tort in the defendant than *Jennings v. Rundall*, *supra*; and one

case in this state, *West v. Moore*, 14 Vt. 447 [39 Am. Dec. 235], professing to follow this case, has perhaps pushed it somewhat to an extreme. The facts in this latter case showed perhaps something more than a mere non-feasance or breach of contract. But this case also professes to go upon the same general ground, and the court deciding it are alone responsible for the construction of its facts.

Applying these general principles to the case before us, it seems to us that the distinction taken in the court below is the true one. So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse or to drive him moderately. But when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose and puts him to another, as he does when he takes another's property by way of trespass.

The case of *Homer v. Thwing*, 3 Pick. 492, is in all its leading facts, and every way in principle, identical with the present. The case of *Fitts v. Hall*, 9 N. H. 441, goes even further perhaps, and yet we like the good sense and love of fair dealing evinced by the decision of that case. There an infant, by representing himself of full age, gains credit, giving his note, and when sued upon the note, avoids it on the ground of infancy. The court held him liable for the goods in trespass on the case. It may not be important to inquire how far this decision will stand with *Johnson v. Pie*, 1 Lev. 169; S. C., 1 Keb. 905, 913; 1 Sid. 129; 10 Petersd. Abr. 559, or with some other of the old cases. But for one I must say I like the truthfulness and firmness evinced in the decision. It seems to me to be a case far more worthy of respect than that class of cases where the courts have shown so much solicitude to give the infant the benefit of my Lord Mansfield's shield, that they have allowed him sometimes to use his privilege as a weapon of offense also. The case of *Vasse v. Smith*, 6 Cranch, 226, goes much further than it is needful to go to make the defendant liable in the present case, and yet not further than sound policy and a proper regard for fair dealing would seem to require. *Campbell v. Stakes*, 2 Wend. 137 [19 Am. Dec. 561], is a full authority for the plaintiff in the present case. And if no case in point were produced, it

seems to us, upon general principles, the plaintiff is entitled to retain his verdict.

Judgment affirmed.

INFANTS' LIABILITY FOR TORTS GROWING OUT OF OR CONNECTED WITH CONTRACTS: See *Word v. Vance*, 9 Am. Dec. 683; *Peigne v. Sutcliffe*, 17 Id. 756; *Campbell v. Stakes*, 19 Id. 561; *Penrose v. Curren*, 24 Id. 356; note to *Humphrey v. Douglass*, 33 Id. 180, where the question is discussed at length; and see *Burley v. Russell*, 34 Id. 146; *People v. Kendall*, 37 Id. 240, and note; *West v. Moore*, 39 Id. 235; *Green v. Sperry*, 42 Id. 519. The principal case was cited in *Hall v. Corcoran*, 107 Mass. 255, to the point that a bailee who has converted the thing bailed is responsible therefor in trover, although his infancy would protect him from liability for a breach of the contract under which the goods were put into his hands; and in *Root v. Stevenson's Adm'r*, 24 Ind. 120, the facts and the ruling of the principal case were given, but it was held that a plea of infancy was good where the bailment was of money generally, and not of specific bills or coins; see also the principal case cited in *Gi'son v. Spear*, 38 Vt. 314, as referring with approbation to *Fitts v. Hall*, 9 N. H. 441, in regard to an infant's liability for fraudulent representations.

BAILEE WHEN LIABLE FOR CONVERSION BY MISUSER OF BAILED PROPERTY: See *Hart v. Skinner*, 42 Am. Dec. 500, and prior cases in note; *Whitlock v. Heard*, 48 Id. 73.

GREEN v. SARGEANT.

[23 VERMONT, 466.]

ADMINISTRATOR HAS NO AUTHORITY TO MORTGAGE DECEDENT'S REAL ESTATE to extinguish the mortgagee's dower right in other portions; and the mortgagee can not assert a claim in the mortgaged premises against the creditors of the estate unless it appears that some portion of the avails of the sale of her dower right has been actually paid over to such creditors.

ADMINISTRATOR HAS NO RIGHT TO PURCHASE ESTATE UPON WHICH HE ADMINISTERS, even when he is solvent and pays full price.

ADMINISTRATOR'S ACCOUNTING IN PROBATE COURT WILL NOT CONCLUDE PROCEEDINGS IN EQUITY against him to compel a release, for the benefit of the estate, of property sold to himself, for the price of which he charged himself in his account; nor will it make any difference that on a second accounting by him after his resignation, and about the time proceedings were commenced in equity, he was charged with interest on the price of the property so sold; nor that on accounting an order of distribution was made of the amount found in his hands.

ADMINISTRATOR DE BONIS NON IS PROPER PARTY TO BRING BILL IN EQUITY to compel a former administrator to release property sold to himself.

BILL in chancery. The bill alleged that the defendant Jabez Sargeant had been appointed administrator *de bonis non* of Frederic Pettes, and had returned an inventory, and obtained an order to sell real estate; that on February 14, 1843, he rendered an account to the probate court, and was ordered to dis-

tribute a sum remaining in his hands among the creditors of the estate, but that he had neglected to do so, and an execution issued on a judgment on his administrator's bond was unsatisfied, he and his sureties being insolvent; that on May 24, 1843, the orator was appointed administrator *de bonis non* in his stead; that a certain brick store had been sold under the order of sale for three thousand dollars, and it was agreed, for the purpose of defrauding creditors, that a note for five hundred dollars of the purchase price should remain unpaid until a suggested claim of dower in the store, by Charlotte Pettes, mother of the deceased, should be extinguished, and in his account Sargeant charged himself with but two thousand five hundred dollars for the sale; that for the purpose of still further defrauding the creditors, a sale of land, known as the "Clement lot," for which nothing had been paid, was made for nine hundred and sixty dollars to Charlotte Pettes, who executed a quitclaim deed of the lot to the defendant Simonds; that Simonds then mortgaged back the lot to Mrs. Pettes to secure the payment to her of sixty dollars annually during her life, and Mrs. Pettes at the same time executed a quitclaim deed to the grantee of the store. The prayer was that Mrs. Pettes and Sargeant be decreed to release all their claim and interest in the "Clement lot;" that Simonds should convey the lot to the orator, and that Sargeant deliver to the orator the note for five hundred dollars for collection. Sargeant alleged in his answer that Mrs. Pettes having declined to release her dower claim in the store, and insisting upon being paid sixty dollars per year therefor, he conveyed the store without any reservation for the claim, he himself assuming the responsibility of removing it; that the five-hundred-dollar note was to be deposited with a third person and remain unpaid until its removal, and after Mrs. Pettes had released her dower, as stated in the bill, he had received the note and had collected thereon three hundred and thirteen dollars and fifty-one cents, for which sum he had accounted in his second administration account, and that previous to the commencement of this suit he had assigned the note to a third person for a valuable consideration; that the sale of the "Clement lot" was made for nine hundred and sixty dollars to Mrs. Pettes, in good faith for the highest sum bid, and she, being unable to make the payment, conveyed the lot to Simonds, and received his note and mortgage for her dower interest in the store, at the rate of sixty dollars per year during her life, she releasing her dower claim; that all these deeds were made in good faith, and without any

intent to defraud the creditors; that he had charged himself in his first account with the nine hundred and sixty dollars thus received, and since the commencement of this suit the probate court had charged him with interest from the time of the sale up to the time of rendering his second account on December 28, 1843; that Simonds agreed, when the deeds were delivered, to hold the lot in trust for Sargeant after being indemnified for his liabilities, and since the commencement of this suit Simonds had conveyed the lot, subject to Mrs. Pettes' mortgage, to Sargeant, who reconveyed it in trust to Simonds to pay the avails of a sale thereof after being indemnified to the creditors of the estate. The answer of Mrs. Pettes, besides alleging in particular her claim of dower, conformed, with Simonds' answer, as to the facts, to the answer of Sargeant. The answers were traversed, and a hearing having been waived before the master as to whether any part of the dower interest had been paid to the creditors, the court made a final decree for the release of the lot, but no decree was made as to the five hundred dollars, the parties being left to their legal rights.

C. Coolidge, for the orator.

Washburn and Marsh, for the defendants.

By Court, REDFIELD, J. The only questions argued in the present case regard the liability of the "Clement lot" to be treated as still a part of the assets of the estate of Frederic Pettes. This is resisted upon numerous grounds, none of which seem altogether satisfactory to this court. We shall dispose of them as briefly as possible.

1. In regard to Mrs. Pettes' claim, it may be said that there is no necessity of treating her dower in the brick store and the land as extinguished, at law even, in order to grant the relief asked for. That seems to us a secondary question altogether. Allowing that she had a subsisting interest in that lot at the time of the sale to Marsh (which is altogether problematical), it must appear that some portion of the avails of the sale of that interest has gone to the benefit of the estate of Frederic Pettes, in order to give her any equitable lien upon the "Clement lot" as a mortgage; and she claimed no other interest during her life-time. She never had and never claimed any interest as purchaser.

And in order to answer the purpose of giving her an equity to hold the "Clement lot" against the creditors of Frederic Pettes' estate, her money must have actually been paid over to them.

For Sargeant, as administrator, had no authority to buy her interest in the brick store and lot and mortgage the real estate of his intestate to pay for the same, by way of annuity during her life. And being bound to know the law, she had no right to make any such contract with him as administrator; and if she did, it was at her own peril. He became her agent in receiving the money of Marsh (even assuming that it was her money), and he held it as her agent until he actually paid it over to the creditors, unless the judgment of the probate court has changed the matter—which we shall hereafter examine. And the defendants having waived a hearing before the master, it must now be treated the same as if it were found that none of the avails of Mrs. Pettes' estate in the brick store went to the creditors of Frederic Pettes.

Jabez Sargeant, then, being merely the debtor of Mrs. Pettes for the avails of her dower in the brick store and lot, could not mortgage the property of the estate to secure that debt. And the transaction, by which the title of the "Clement lot" was conveyed to the defendant Simonds, to secure the payment of an annuity to Mrs. Pettes and the remainder in trust for Sargeant, is nothing more nor less than applying the property of the estate to secure his own debt. And Mrs. Pettes, knowing all the facts, is bound to know the law arising upon the facts. We do not think it necessary, then, to go into the inquiry, what interest Mrs. Pettes had in the brick store and lot. This disposes of all equity in Mrs. Pettes, as superior to Sargeant.

2. It is claimed that Sargeant had an absolute title to the "Clement lot." If so, his proceeding since the commencement of this suit, under the advice of counsel, by which he declared a trust for the remainder, after securing Mrs. Pettes, in favor of the creditors of Federic Pettes, was certainly most remarkable. It must either have resulted from wrong advice or a consciousness of some moral or equitable infirmity in his title. But aside from that: 1. The administrator has no right to become a purchaser of the estate upon which he administers, even when he is solvent and pays the full price. And if he do so indirectly, it is competent for those interested in the estate, upon discovering such purchase to be for his benefit, or in a reasonable time thereafter, to compel a resale, or they may elect to treat him as a purchaser. 2. It can not be said that the passing of the administration account, and charging Sargeant with the amount of this sale, concludes the estate. For that is a thing done by Sargeant himself, where he is in fact both

plaintiff and defendant. And in a late case in Addison county, *Adams v. Adams*, 22 Vt. 50, such an accounting was held to be of no force, as against a proceeding in equity. And if it be said that such a judgment can not be attacked thus collaterally, it should be borne in mind that this came in by way of defense, and is not pleaded by way of estoppel, but only by way of recital; and in such cases the judgment is merely evidence, to have such effect as the triers of the matter of fact deem reasonable—which in most cases is indeed regarded as conclusive, but in the present case could not be esteemed of any force, because the estate was represented on that occasion by Sargeant, who was the only party in interest adverse to them; and the creditors were evidently not aware of his insolvency, and that of his bail, or that he would not pay over the amount of the sale. And in the very same answer Sargeant sets forth his having now conveyed the remainder of the estate to Simonds, in trust for the creditors of the estate—thus, in effect, waiving all benefit of being charged in his administration account with the price of it.

As to his being charged with interest on the price, in his second account, that is a mere collateral matter, and of no force, except as matter of evidence, and not satisfactory in that view. We can not suppose it was the intention of the present administrator thus to ratify the sale; for it was either since or just about the time of the institution of the suit, December, 1843, the subpoena to the bill being dated December 1, 1843. This item of interest might have been allowed as rent actually received by Sargeant, or which he ought to have received between the time of the sale in February, 1841, and the second accounting.

As to the charging Sargeant in his second account with money received on the five-hundred-dollar note given for what he claimed as Mrs. Pettes' interest in the brick store, it passed doubtless on the ground that she did not regard it as her property, and that it was in fact the property of the estate. And it is supposable, and even probable, that it might have been allowed on the ground that Mrs. Pettes in fact had no interest whatever in the brick store, which was most undoubtedly the fact, and her interest in the land (if she had not relinquished it, which is more than probable) was less than the balance of the note, which Sargeant sold and received pay for and never accounted for, even in form.

As to the decree of dividend, it is but a portion of the judgment passing the administration account, and merits the

same consideration only. The orator is the proper person to bring this bill; it is a proper matter for the consideration of a court of equity, involving both matter of trust and of fraud, both of which are eminently matters within the proper cognizance of such court. We entertain no doubt the probate court will be able to so distribute this estate as to do justice among the creditors. If Sargeant or his sureties should ever rise above their present state of security from insolvency, so that the fact that the price of this land is included in his account is of any practical importance to them, the probate court, or a court of equity, will readily set the matter in a safe condition. This property has not fairly and fully been administered upon until it reaches its ultimate destination, the hands of the just creditors. The sureties of Sargeant have no equity superior to that of Sargeant as to this estate. We think there was no adequate remedy at law.

We think, therefore, that the decree of the court of chancery should be affirmed in all respects, and the case remanded to that court to be carried into effect.

ADMINISTRATOR OR EXECUTOR WHETHER MAY PURCHASE PROPERTY OF ESTATE FOR HIS OWN BENEFIT: See *Ryden v. Jones*, 9 Am. Dec. 660; *Fellows v. Fellows*, 15 Id. 412; *Brannan v. Oliver*, 19 Id. 37; *Burch v. Lantz*, 21 Id. 458; *McClure v. Miller*, Id. 522; *Scott's Ex'r v. Gorton's Ex'r*, 33 Id. 576, 578; *Buckles v. Lafferty's Legatees*, 40 Id. 752; *Bailey's Adm'r v. Robinsons*, 42 Id. 540; *Pearson v. Moreland*, 45 Id. 319; *Ersikine v. De la Baum*, 49 Id. 751; *Musselman v. Eshleman*, 51 Id. 493; *Worthy v. Johnson*, 52 Id. 399; *Pennock's Appeal*, 53 Id. 561.

CONCLUSIVENESS OF ACCOUNTING BY ADMINISTRATORS OR EXECUTORS IN PROBATE COURT: See *Sever v. Russell*, 50 Am. Dec. 811; *Green v. Creighton*, 48 Id. 742, and notes thereto.

ACCOUNTING OF ADMINISTRATORS AND EXECUTORS IN EQUITY: See *Salter v. Williamson*, 35 Am. Dec. 513; *Green v. Creighton*, 48 Id. 742, and notes.

ADMINISTRATOR DE BONIS NON PROPER PARTY TO CALL FORMER ADMINISTRATOR TO ACCOUNT: *State v. Moore*, 53 Am. Dec. 401, and note.

RELIEF WHERE OBTAINABLE WHEN ADMINISTRATOR OR EXECUTOR SELLS PROPERTY TO HIMSELF.—To set aside purchases made by executors at their own sale, heirs must resort to equity: *Worthy v. Johnson*, 52 Am. Dec. 399; but an action at law may be brought by an administrator *de bonis non* to set aside a fraudulent sale by the administrator in chief, where it is unnecessary to join the distributees or creditors of the estate: *Swink's Adm'r v. Snodgrass*, Id. 190.

INTEREST ON MONEYS IN EXECUTOR'S HANDS will not be suspended pending the examination of his account: *Yundt's Appeal*, 53 Am. Dec. 496.

PARKHURST *v.* SUMNER.

[23 VERMONT, 538.]

JUDGMENT CONCLUDES ALL MATTERS WHICH MIGHT HAVE BEEN URGED BEFORE ADJUDICATION, as to the principal parties and privies in interest or estate, and among them is included bail.

JUDGMENT CONCLUDES BOTH AS TO PRINCIPAL AND BAIL SUBJECT-MATTER OF PLEA that the original plaintiff was induced to consent to the judgment for costs against him when in a state of intoxication produced by the defendant in the suit, the present plaintiff.

JUDGMENT FOR COSTS DOES NOT CONCLUDE BAIL, when entered up in the principal action by collusion between the original parties, with a view to defraud the bail, and the bail may plead the collusion at the earliest opportunity afforded him in a suit upon his recognizance.

PLEA OF COLLUSIVE JUDGMENT IN PRINCIPAL ACTION TO DEFAUD BAIL IS BAD IN FORM, in a suit upon a recognizance, unless it alleges that the judgment was finally rendered in pursuance of the alleged corrupt agreement, and by the collusion of the principal of the bail.

REPLEADER WILL BE AWARDED AND COSTS TO ABIDE FINAL EVENT OF SUIT, where the substance of the defense as set forth in the plea is good but the plea is bad in form.

SUIT upon recognizance entered into by the defendant Sumner in an action in favor of one Cisco against the plaintiff Parkhurst. The substance of the two pleas in bar is fully stated in the opinion, with the exception that the defendant in his first plea, after alleging a corrupt and fraudulent agreement, with intent to defraud him, between Parkhurst and Sisco, that the latter should abscond and leave the state, and that judgment for costs should be rendered in the favor of the former against the latter, in order that the defendant should be held liable on his recognizance, and be subjected to the payment of the costs, alleged that afterwards, at the June term, 1842, the county court rendered judgment in favor of Parkhurst against Sisco for the said bill of costs. The plaintiff demurred specially, and the pleas in bar were held insufficient, and judgment rendered for the plaintiff. Exceptions by the defendant.

S. Sumner, for the defendant.

T. P. Redfield, for the plaintiff.

By Court, REDFIELD, J. This is a suit upon a recognizance, and two pleas are interposed: one alleging that the judgment in the principal action was entered up by collusion between the original parties, with a view to defraud the bail; and the other alleging that the original plaintiff was induced to consent to the

judgment for costs against him when in a state of intoxication procured by this plaintiff.

The subject-matter of this latter plea is no doubt concluded by the judgment, both as to the principal and the bail. It is a universal rule in regard to judgments, that all matters which might have been urged by the party before the adjudication are concluded by the judgment, as to the principal parties and all privies in interest or estate—and among privies are no doubt included bail.

The subject-matter of the first plea seems to us not to come altogether within the true intent and purpose of this rule. This collusion between the original parties is not a matter of which they could ever have availed themselves, and there is no doubt it will avail the bail, either at law or in equity. And we see no very obvious objection to allowing the bail to plead it at the earliest opportunity afforded him in the suit upon his recognition. We think, therefore, that the substance of the plea is a good defense for him, and that it is not concluded by the judgment against the principal, since it is a matter which no one could properly have urged in that action.

But it seems to us that the form of this plea is bad in substance, in not alleging that the judgment was finally rendered in pursuance of the alleged corrupt agreement, and by the collusion of Sisco. Nothing of this is alleged, and no fair opportunity is afforded the opposite party to traverse the very gist of the defense, to wit, that the judgment was entered up collusively. A traverse of all the plea contains upon this point will only raise the question, whether the judgment was rendered at the June term, 1842. The plea it seems to us should allege, at the least, that the judgment was rendered in pursuance of the corrupt agreement, and by the collusion and consent of Sisco, in order to enable the other party to raise the question upon a simple traverse. As the plea now stands, it may all be true, and the case in fact finally disposed of precisely in the mode alleged in the pleas in the other case [*Sisco v. Parkhurst*, 23 Vt. 537], which is not what we suppose the party intends by his pleas.

The declaration is said to be defective; but we have not been furnished with a copy.

The judgment is reversed, and as the substance of the defense is considered good and the form bad, we think a repleader should be awarded, and costs abide the final event of the suit.

Repleader awarded both parties from the first, if they choose.

CONCLUSIVENESS OF JUDGMENTS AS TO PARTIES AND PRIVIES, IN GENERAL: See *Embury v. Conner*, 53 Am. Dec. 325; *Doty v. Brown*, Id. 350; *North River Meadow Co. v. Shrewsbury Church*, Id. 258; *Coffin v. Knott*, 52 Id. 535, and the prior cases in this series referred to in the notes thereto. A judgment of a court of competent jurisdiction is final, as a general rule, not only as to the subject-matter actually determined, but also as to every other matter which the parties might have litigated and have had decided in the same cause: *Embury v. Conner*, *supra*. As to impeaching a judgment collaterally for collusion, see *Dougherty's Estate*, 42 Id. 326. The principal case was referred to in *Greenup v. Crooks*, 50 Ind. 420, in considering the conclusiveness of a judgment on a subsequent action; and cited among others in *The Acorn*, 2 Abb. 446, to the point that judgments may be impeached collaterally by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered; but it is otherwise if the facts were necessarily before the court and passed upon.

BAIL AND SURETIES WHETHER BOUND BY JUDGMENTS AGAINST PRINCIPALS: See *Masser v. Strickland*, 17 Am. Dec. 668; *Heard v. Lodge*, 32 Id. 197, and note. The principal case was cited in *Chamberlain v. Godfrey*, 36 Vt. 383, as holding that special bail, who are bound to respond to the judgment, are concluded by judgments against their principals; and in *Mott v. Hazen*, 27 Id. 213, it was followed on the proposition that bail are so far privies to a judgment against the principal that they can not avoid it for any irregularity in the proceedings upon which it was obtained; but collusion between the parties to a suit to have judgment entered up for the purpose of defrauding the bail is a good defense to an action on the recognizance.

PATTERSON v. GAGE.

[23 VERMONT, 558.]

COMPENSATION FOR LABOR ACTUALLY PERFORMED MAY BE RECOVERED by one who had contracted to work for a stipulated time, but who left the employment before its expiration in consequence of rudeness in deportment towards her of a member of another family residing in the same house, although the employer had no control over such family, and the two families were as distinct as they well could be and reside in the same house.

Book account. The facts are stated in the opinion.

G. C. Cahoon, for the plaintiff.

O. T. Brown, for the defendant.

By Court, KELLOGG, J. The county court rendered judgment, on the report of the auditor, for the defendant. The plaintiff insists that the judgment should have been for the plaintiff.

It appears that the plaintiff's account was for her personal labor for the defendant under a contract to labor for him six months, and that after having continued in his service under the contract about three months, she left his employment with-

out the consent of the defendant, and, as he insists, without any sufficient cause; and if this objection be well founded in fact, according to repeated decisions of this court, the plaintiff would not be entitled to recover. In all contracts for personal labor for a stipulated time, a voluntary abandonment of the contract before full performance has been uniformly held, in this state, to be a forfeiture of all right to recover for the service actually performed, although the service may have been beneficial to the other party. The question then arises, Did the plaintiff leave the service of the defendant without sufficient cause? And this question the auditor referred to the county court, who virtually decided that the plaintiff had no justifiable cause for leaving the defendant's service.

It appears that the defendant resided in a house with his father, though the families of the father and son were as distinct and separate as they well could be and reside in the same house, that the defendant had no control over his father and his family, and that the defendant was in no manner responsible for the conduct of any member of his father's family towards the plaintiff; and it further appears that the plaintiff took a dislike to a member of the father's family by reason of some rudeness in his deportment towards her, and that that individual was the father of the defendant. The auditor does not specify the particular rudeness in the deportment of the defendant's father of which the plaintiff complains, but we are induced to believe it could not be of a trifling character. Indeed, we think it is to be fairly inferred from the report of the auditor that the rudeness referred to was of a character aiming at a violation of the chastity of the plaintiff, and this by an individual residing in the same house with the defendant, where the plaintiff was required to labor, and that individual the father of the defendant, and over whom the defendant had no control. If we are correct in this conclusion, we have no hesitation in saying it furnishes a sufficient excuse for the plaintiff's leaving the employment of the defendant. If the defendant could not control the inmates of his house so as to protect the plaintiff from their abuse, he has no reason to complain that she leaves his service. Nor does her leaving under such circumstances deprive her of a right to compensation for the labor she actually performed.

The judgment of the county court is reversed, and judgment entered for the plaintiff for the balance due her, as reported by the auditor.

RECOVERY FOR SERVICES RENDERED WHERE SPECIAL CONTRACT NOT COMPLETED.—Where the contract is abandoned by consent, or substantially performed: *Newman v. McGregor*, 24 Am. Dec. 293; *Hunt v. Test*, 42 Id. 659; where neither party is in default: *Merrill v. Ithaca & O. R. R.*, 30 Id. 130; where the plaintiff has been prevented from completing the contract through sickness: *Greene v. Linton*, 31 Id. 707; where the plaintiff is in default: *Britton v. Turner*, 26 Id. 713; *Helm v. Wilson*, 28 Id. 336; *Eldridge v. Rowe*, 43 Id. 41; *McKinney v. Springer*, 54 Id. 470; and see *Marshall v. Jones*, 25 Id. 260; where the work is beneficial to the defendant: *Hayward v. Leonard*, 19 Id. 268; *Phelps v. Sheldon*, 23 Id. 659; *Wadleigh v. Town of Sutton*, Id. 704; *Norris v. School District*, 28 Id. 182; *Van Deusen v. Blum*, 29 Id. 582; *Gilman v. Hall*, 34 Id. 700; *Blood v. Enos*, 36 Id. 363; *Eldridge v. Rowe*, 43 Id. 41; *McKinney v. Springer*, 54 Id. 470; where the defendant is in default: *Helm v. Wilson*, 28 Id. 336; *Merrill v. Ithaca & O. R. R.*, 30 Id. 130; *Rankin v. Darnell*, 52 Id. 557; *Clark v. Mayor etc. of New York*, 53 Id. 379. See the various questions considered, and the prior cases in this series cited in the note to *Hayward v. Leonard*, 19 Id. 272.

FLETCHER v. JACKSON.

[23 VERMONT, 581.]

CONTENTS OF LOST INSTRUMENT CAN NOT BE PROVED unless it appears that reasonable search has been made in the place where the paper was last known to have been, and if not found there, that inquiry has been made of the person last known to have had its custody.

RECITAL OF INDENTURE IN BOND CONCLUDES SIGNERS OF BOND, where the bond was executed to secure the faithful performance of duties imposed by the indenture on one who was a party thereto; and in a suit for contribution against a joint signer of the bond, distinct proof to show the terms of the indenture need not be adduced.

RECORD OF RECOVERY AGAINST SURETIES ON BOND IS COMPETENT EVIDENCE AGAINST CO-SURETIES, in a suit for contribution, of the amount of recovery, but not of the default of the principal; and the fact that the case was referred in the county court, and that judgment was entered by consent in the supreme court, will not affect the judgment as evidence, the necessity of these steps being sufficiently explained.

SURETIES' RIGHT OF CONTRIBUTION FOR COSTS AND EXPENSES IN DEFENDING SUIT EXISTS AGAINST CO-SURETY when the defense was made under such circumstances as to be regarded hopeful and prudent.

SURETIES JOINTLY PAYING JUDGMENT AGAINST THEM MAY SUE JOINTLY in equity the heirs of a deceased co-surety for contribution; and a decree may be made against the defendants severally for so much as each is liable.

SURETY'S COLLATERAL OBLIGATION OF CONTRIBUTION IS RELEASED by his co-sureties executing to the principal a general release of all liability for any sums they should pay; and it does not make any difference that the release was only intended to remove the principal's interest, in order that he might testify in the suit against the co-sureties.

EQUITY WILL NOT RESTRICT OPERATION OF GENERAL RELEASE when it was such a paper as was intended to be executed, but the parties might have mistaken its operation, or had not that in mind.

ORATORS SHOULD FILE SUPPLEMENTAL BILL stating the grounds upon which they desired to contest the release, in order to have the matters properly in issue before the court, on the coming in of the answer setting up a release of the defendant's liability, where the orators desire to restrict its operation.

BILL in chancery, for contribution for payments and expenses and costs of a suit, against the heirs of one John Jackson, who was co-surety with the orators on a bond. Most of the material facts are stated in the opinion; the rest are as follows: A supplemental answer of the defendants set up that the orators, during the pendency of the suit against them on the bond, released the principal, Waller, from all liability to them for any sums for which they were or might be accountable in such suit. The original bond was alleged to be lost, and testimony was given as to its loss and contents. The indenture, by which the association employing Waller, and to which the latter was a party, was formed, was not produced, nor any reference made to it, but it was recited in the condition of the bond. A decree was made against the defendants for the payment of their proportionate share of the damages and costs recovered against the orators, from which the defendants appealed.

Starr and Briggs, for the orators.

C. L. Williams, for the defendants.

By Court, REDFIELD, J. This is a bill in equity brought by the orators, who were joint signers of a bond with the defendants' ancestor, for the faithful discharge of duty by Calvin C. Waller as agent and attorney in regard to certain matters undertaken by him. He failed in that undertaking, and suit being brought on the bond against the signers, with the exception of Jackson and some others, judgment was obtained for the default of Waller, and the plaintiffs paid the amount, being some fourteen thousand dollars (including costs), besides counsel fees. This bill is brought to compel contribution on the part of Jackson's heirs, he having deceased, and his estate having been distributed to the defendants as his heirs. In the course of the trial of the suit for Waller's alleged defalcations, it became important, and indispensable almost, for the interest of the signers of the bond to make use of the testimony of Waller, if that

could be done. For as he was the only one who knew any facts sufficient to reduce the liability below the penalty of the bond, fifteen thousand dollars, it would be necessary to suffer judgment for that amount, or else resort to the testimony of Waller, which could only be used by releasing his interest—which the plaintiffs did, by executing to him a general release of all liability to them by reason of the plaintiffs having signed the bond as surety for him. He was admitted as a witness, and the amount of the recovery reduced something like two thousand dollars, and there was a reasonable prospect at the time that the recovery would, in that way, be reduced to a considerably lower sum. The other facts necessary to understand the points decided by the court will appear in the course of the opinion.

1. A question is made in regard to the proof which was introduced to show the loss of the original bond. This is a point not very material to the ultimate determination of the case, as, if the proof which was offered is insufficient, it can hereafter be supplied, if the case can be sustained upon other grounds. The general rule upon this subject is familiar, that reasonable search shall be made in the place where the paper is last known to have been, and if not found there, then its present place of deposit shall be searched out in the usual mode, by making inquiry of those most likely to know its whereabouts—and that is, of course, of the person last known to have had its custody.

In the present case the proof seems to be somewhat defective, in not producing the testimony of Johnson, who, as cashier of the Bank of Woodstock, seems now last to have had the paper in his custody. The Bank of Woodstock seems to have been the only place of deposit for the bond during the trial of the former suit, and since, so far as we can now learn. And there does not seem to be any certain legal proof in the case that the bond is not now in the bank, although it is highly probable that it is not, as matter of mere conjecture rather than of legal proof. And if not there, there is nothing to show when or by whom it was removed. But we have expended but little time upon this point.

2. Some question is made, whether distinct proof should not have been adduced in this case to show the terms of the original indenture, by which the association was constituted. But that is recited in substance in the bond executed by the plaintiffs and Jackson, and this recital upon general principles of estoppel will conclude the defendants.

3. How far the record of the recovery against the plaintiffs upon trial and full defense, the testimony of Waller being used, is to be regarded as *prima facie* evidence of Waller's default, it is not strictly necessary to determine here, perhaps, as there is some testimony beyond this, and the record is clearly competent evidence in the case to show the amount of the recovery against the plaintiffs. The general rule undoubtedly is, that in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*. The judgment of eviction, in order to show a breach of the covenants of warranty, is a case of the first class. The judgment of eviction is a necessary step in making out the liability of the warrantor, that is, the *casus fœderis*. So too, generally, I apprehend, when any one undertakes to indemnify against the consequences of a suit, or that a suit brought shall be effectual, the judgment in either case, being the *casus fœderis*, is *prima facie* evidence of the liability.

And on the other bond, where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, too, if the guarantor have notice of suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself, and then insist upon the right to contest the whole ground. The cases of joint and several obligors, and especially of sureties and co-sureties, as a general rule, we apprehend, have been ranked under the latter class of cases: *Bramble v. Poultney*, 11 Vt. 208. Hence it has been generally held in this class of cases, that a release of the joint debtor from his liability to contribute to the costs and expenses of the suit makes him, when not a party to the suit, a competent witness for the defendants, and that a joint debtor, when not sued, is always a competent witness for the plaintiffs without a release. Many would therefore regard the release of the plaintiffs to Waller more extensive than it need to have been. But that question may arise hereafter. We think, therefore, that although the record was evidence, like any other fact, to show the amount of the payment made by the plaintiff and the circumstances under which it was made, we could scarcely regard it as evidence beyond that. But there being some slight

evidence in the case beyond that, we might not deem it necessary to open the case upon this ground. These extracts from the record are not evidence of the particular facts recited therein. The exemplification of the entire record is necessary for any such purpose.

4. The fact that the case was referred, in the county court, and that judgment was entered by consent, in the supreme court, will not under the circumstances affect the judgment, as evidence in this case. The necessity of both those steps is sufficiently explained by the evidence.

5. In regard to the extent of the plaintiffs' right to contribution, as against the defendant, we think the rule laid down by this court in *Marsh v. Harrington*, 18 Vt. 150, is strictly applicable. The right of the co-sureties, in such cases, to compel contribution for costs and expenses incurred in defending a suit, depends altogether upon the question whether such a defense were made under such circumstances as to be regarded hopeful and prudent. If so, the expenses of defense may always be recovered. The case of *Knight v. Hughes*, 3 Car. & P. 467, is only a *nisi prius* case, and not much authority any way; and so far as it impugns the rule above laid down, it is in conflict with the general tenor of the cases upon the subject, and especially with the one last cited from our own reports. The general rule upon this subject is correctly stated in the American note to *Dering v. Earl of Winchelsea*, 1 White & Tudor's Leading Cases in Equity, 60: "In *assumpsit* the surety may recover of the co-surety what he has paid, with interest and cost;" citing *Hayden v. Cabot*, 17 Mass. 169, which fully sustains the *dictum*, except that it is a suit by a surety against his principal; but the principle is the same, I apprehend; also *Wynn v. Brooke*, 5 Rawle, 106, which I have not seen.

6. We entertain no doubt, upon the proofs in the case, that the plaintiffs paid the judgment against them jointly, and may well sustain this suit in their favor jointly. And we see no objection to the decree in the case being against the defendants severally, for so much as each is liable for. Their obligation is in its nature several, and the statute seems to contemplate that the remedy shall be several: R. S., c. 49, secs. 51, 52.

The only serious difficulty which we have found in the case is in relation to the effect which the plaintiffs' release, given to Waller, the acknowledged principal, shall have in this suit for

contribution against co-sureties, in relation to the very money recovered in the suit in which the release was given. And although we have felt sincerely desirous of affording the plaintiffs that equitable relief to which upon general principles they are no doubt entitled, it seems impossible to regard this release as having any less effect, at law certainly, than to cut off all collateral remedies for the principal thing released. This is one of the most obvious and universally recognized principles of the law of contract. It is upon principle almost too plain to admit of simplification. To suppose the contrary would be to expect the stream to continue when its fountains were cut off; or a weight to remain suspended when the power which sustained it was removed; or that the obligation of the sureties is superior to that of the principal, or that it is something different from and independent of it. But all good sense and sound logic, all experience and all learning, teach the reverse.

In form it may not appear so obviously absurd that the plaintiffs should claim to maintain this action after having released Waller, as that a creditor, having released his principal debtor, should claim to recover of the surety, without reserving any right to go against the surety; but in fact it is the same thing. The plaintiffs and Jackson were sureties jointly for Waller to the common creditor, the association who employed Waller. But there was also a subordinate suretyship for Waller to each other. Upon payment of any sum of money for Waller to the common creditor by any one of the sureties, a right of action accrued to that one to recover of Waller the whole sum paid, and the other sureties were severally bound as sureties for Waller, and collateral to his primary obligation in their aliquot proportion of the entire sum. Thus these plaintiffs, by releasing Waller from all liability to refund any sum they should pay, of necessity thereby released all collateral obligations resting upon the co-sureties to contribute their proportion of the sum primarily due from Waller, and which had been released to him. So that, had the release been executed by but one of the sureties, and he subsequently compelled to pay the whole debt, he must be content to bear the loss. By releasing Waller, he became principal as to any liability assumed by himself. By contracting not to sue the principal debtor, he impliedly bound himself not to do that indirectly which he had assumed not to do directly.

It seems to us that this is a matter which can not be made

more perspicuous by argument or illustration. The case of *Hobart v. Stone*, 10 Pick. 215, is fully in point, and the reasons assigned quite sufficient, and as satisfactory as could be given, as it seems to us. The court say: "A co-surety's obligation to contribute is collateral only, and whatever discharges the principal will of course discharge the co-surety." If the obligation of Jackson to contribute his aliquot proportion of any sum the other sureties should be compelled to pay for Waller, by virtue of the joint undertaking of all, was really an obligation of suretyship for Waller, and merely collateral to his primary obligation to refund the whole sum paid—and it seems to us impossible to regard it otherwise—then it is clear, upon general principles, that when the plaintiffs put it out of their power to sue Waller, they lost all claim upon his sureties. For the law regards any modification of the principal contract, by which the right of action is suspended, for the shortest time, as a release of the surety. But it seems needless to pursue this matter further. A suretyship is merely, in the language of the statute of frauds, "an undertaking for the debt of another," and the defendants' undertaking was nothing else.

One view of the case has been urged upon our consideration, which has indeed something of plausibility about it, and which we have examined with some care, and with a disposition to adopt it, if found applicable to the case. It is, that the release, being given for one object, shall not, in a court of equity, be permitted to operate beyond its primary purpose, and thus produce an end not in contemplation at the time of its execution. But there seem to us invincible obstacles in the way of applying any such rule of restraint to the operation of this release.

1. This release was intended to remove all interest of Waller in the then pending litigation, and to effect that object by removing at once from him all possible prospective liability for any portion of the judgment recovered in that suit. This surely would not have been effected in the mode contemplated if Jackson or his heirs were still liable to contribution. For if so, they must of course have an action against Waller for the amount. And we learn from the testimony that this view was suggested, as an answer to the release, and the referees held that it did remove Waller's interest, upon the ground, doubtless, that the release of Waller from all liability did, by consequence, release the co-sureties from contribution.

2. But if we should regard this release as more extensive than

it need be to accomplish the object of releasing Waller's interest in that suit, it will be difficult to say there was any mistake or misapprehension of the parties in regard to its execution. It is just such a paper as the parties chose to execute; and if it could be shown that the parties mistook its operation in this suit, or did not have that in mind, it will not make out a case for the interference of a court of equity to restrain the operation of the contract. For the parties, if they understood the subject-matter of their contract, were bound to know that it must cut off all contribution from co-sureties, to the extent of the release, in order to produce the immediate end in view. A release of Waller from all liability to refund the expense of the then pending litigation would, as we have already suggested, doubtless have removed all interest in Waller. But to have that effect, it must not only have had the effect to release him from all direct claim for such expense, but from all indirect claim, by means of the co-sureties. And so must any release to remove Waller's interest operate, not only upon the direct claim against Waller, but upon all collateral remedies for the same thing. And this is the view the referees must have taken of the thing in order to admit Waller.

And in this view of the subject, it is not that the parties have executed a release operating more extensively than it needed to have operated, or than it was expected to operate, but that probably, either through mistake of the law or from overcaution, and to save all question and make the matter secure, they saw fit to give Waller a general release "from all liability," when probably a more restricted release might have answered the end equally well. But was it ever known that parties having proceeded upon any such ground could claim to be set back upon their former standing? We think not. One might almost as well expect to be informed on application to a court of equity, in advance, what kind of release they should execute. The truth is, that parties must act in such cases, and they expect to act, altogether upon their own responsibility; and if they release a right of action, in order to get a witness admitted to testify, when no such release was necessary, or give a broader release than was needful, they must abide the consequences; and it would be a novel case for a court of equity, in such case, to restore the party to the rights which he had thus unnecessarily released. If that could be done, the proceeding of releasing a witness would be a safe one!

But those cases, where courts of equity interfere to restrain the operation of releases, are confined within narrow limits, and proceed upon principles of well-settled law.

1. Courts of equity will restrain a general release to the thing or things intended to be released. As upon a release of all demands, when some particular demand was in view, the court of chancery will not allow the release to take advantage of the general words to defeat the collection of a demand not then in the minds of the parties. So, too, a court of equity will reform contracts in all cases, upon the most indubitable evidence that they were so drawn as not to express the intention of the parties.

2. Another class of cases where courts of equity relieve the party from the consequences of his own inadvertence to some extent, is where he is made liable at law for a penalty, or where the terms of his contract subject him to loss in the nature of a forfeiture. In all such cases courts of equity interfere, and when the damages are clearly subject to estimation, upon the payment of such sum as is full compensation, decree restitution.

3. The case of *Clagett v. Salmon*, 5 Gill & J. 314, cited from 2 Eq. Dig. 417, decides that when the creditor releases one of two or more joint and several debtors, not intending to release the debt, a court of equity will restrain the operation of the release. The case, upon examination, I find to be precisely the same case put by Lord Eldon in *Boulbee v. Stubbs*, 18 Ves. 20—that is, that of a composition made with the principal, reserving the right to collect the balance of the surety—which Lord Eldon justly says is “so very absurd that it ought to appear plainly,” and it is no precedent for the present. And it seems to us impossible to find any general principle established by the past history of equity jurisprudence which would justify our limiting the operation of this release, in this case, which would not equally justify that interference in all cases where we might suppose it more just if the parties had made a different contract.

4. In form, if any such interference of the court were desired upon the coming in of the supplemental answer urging this portion of the defense, the orators should have filed their supplemental bill, stating the grounds upon which they desired to contest the release so as to have had the matters properly in issue before the court. But that is mere form, and could be reached now if the merits were in favor of the plaintiffs. *Clagett v. Salmon* expressly requires that the cause for giving a con-

tract of release a restricted operation should be alleged in the bill, and issue joined on that point in order to justify a decree qualifying its operation. So that in strictness this question did not arise in this case; but as it was important to have it settled, and either now or hereafter it must arise in the case, and it having been fully argued, we have examined it and given the result of that examination. We do not intend to say that the chancellor will be absolutely precluded from now suffering the question to be raised in form upon the record; but it seems to us that such a step could not avail the orators.

The result is, that this decree must be reversed and the case be remanded to the court of chancery, with instructions to that court to dismiss the plaintiffs' bill.

SECONDARY EVIDENCE OF CONTENTS OF LOST INSTRUMENTS AFTER DILIGENT SEARCH FOR ORIGINALS: See *Judson v. Esleva*, 12 Am. Dec. 32; *Ocean Ins. Co. v. Francis*, 19 Id. 549; *Hughes v. Easten*, 20 Id. 230; *Compton v. Mathews*, 22 Id. 167; *Luce v. Snively*, 28 Id. 725; *Oriental Bank v. Haskins*, 37 Id. 140; *Juzan v. Toulmin*, 44 Id. 448; *Jones v. Robinson*, 54 Id. 212. As to the admissibility of parol evidence of the contents of a lost or destroyed record, see *Pruden v. Alden*, 34 Id. 51; *Harvey v. Thomas*, 36 Id. 141; *Lyon v. Bolling*, 48 Id. 122; *Eakin v. Doe ex dem. Vance*, Id. 770. As to the necessity of an affidavit of loss, see *Hoddy v. Hoard*, 54 Id. 456. The principal case was cited in *Thrall v. Todd*, 34 Vt. 100, to the point that before parol evidence of a written instrument, supposed to be lost, can be given, it should be shown that a search for it had been made in good faith and with proper diligence in the place where it is likely to be found, and that such search proved ineffectual.

RECITALS AS ESTOPPELS: See *Hall v. Benner*, 21 Am. Dec. 394; *Stow v. Wyse*, 18 Id. 99; *Den v. Chaffin*, 22 Id. 711; note to *Graff v. Castleman*, 16 Id. 754.

SURETY'S RIGHT OF CONTRIBUTION IN GENERAL: See *Cage v. Foster*, 26 Am. Dec. 265; *Harrison v. Lane*, 27 Id. 607, and prior cases in the notes thereto; *Roberts v. Adams*, 31 Id. 694; *McPherson v. Talbott*, 32 Id. 191; *Morrison v. Poyntz*, Id. 92; *Rainey v. Yarrowborough*, 38 Id. 681; *Preston v. Preston*, 47 Id. 717; *Wayland v. Tucker*, 50 Id. 76; *Dunn v. Sparks*, Id. 473; *Jones v. Blanton*, 51 Id. 415; *Dole v. Warren*, 52 Id. 640; *Aiken v. Peay's Ex'rs*, 53 Id. 684.

SURETY'S RIGHT OF CONTRIBUTION FOR COSTS AND EXPENSES.—A surety may recover contribution from his co-surety for the costs and expenses of defending a suit against him for the debt, if the defense was made under such circumstances as to be regarded as prudent: *Wagenseller v. Prettyman*, 7 Ill. App. 197; and this rule was recognized in *Downer v. Baxter*, 30 Vt. 472, in holding that a surety may recover of his principal costs which he has incurred in litigating in good faith the claim upon which he is surety, both citing the principal case.

EXECUTORS OF DECEASED CO-SURETY MAY BE SUED FOR CONTRIBUTION: *Aiken v. Peay's Ex'rs*, 53 Am. Dec. 684; but see *Waters' Representatives v. Riley's Adm'r*, 18 Id. 302.

JOINDER OF CO-SURETIES IN SUIT FOR CONTRIBUTION: *Jones v. Blanton*, 51 Am. Dec. 415; *Powell v. Matthis*, 40 Id. 427.

SURETY RELEASING PRINCIPAL TO TESTIFY, EFFECT OF: See *Bank of Limestone v. Penick*, 15 Am. Dec. 136.

DISCHARGE OF PRINCIPAL DISCHARGES SURETY: *United States v. Simpson*, 24 Am. Dec. 331; *Johnson v. Planters' Bank*, 43 Id. 480; and see *Bank v. Fordyce*, 49 Id. 561.

MISTAKE, WHEN RELIEVED AGAINST IN EQUITY: See *Leavitt v. Palmer*, 51 Am. Dec. 333, and prior cases in note. The principal case was cited in *Fletcher v. Bennett*, 36 Vt. 665, to the point that where contracts have produced results not anticipated, the parties have not been relieved, unless that could be done, and the contract left operative as to what they did intend.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

SUTTON *v.* SUTTON.

[7 GRATTAN, 234.]

MISTAKE IN REGARD TO VALIDITY OF GRANTOR'S TITLE is no ground for relief to a purchaser, when he purchases land without agreement, express or implied, for a conveyance with warranty of the title.
EQUITY WILL NOT RELIEVE AGAINST MISTAKE IN QUANTITY OF LAND SOLD, when it appears that the parties intended a contract of hazard.
IN SALES BY TRUSTEE, RULE CAVEAT EMPTOR APPLIES.

APPEAL from the circuit court of Caroline county. Richard Hoomes and his wife conveyed to Norborne E. Sutton a tract of land in trust, to be sold to pay certain debts, indemnify a surety of Hoomes in certain bonds, and the balance of the purchase money, if any should remain, to Hannah Hoomes in consideration of her relinquishing her right to dower in the tract sold. The deed contained no warranty of title. The tract was sold at auction to John Sutton. The purchaser afterwards filed a bill in the circuit court, alleging that eighty acres of the tract were claimed and held by W. W. Dickinson; that Hoomes was dead and his estate insolvent. The debts secured by the deed were discharged. He therefore prayed that the trustee might be restrained from paying over the balance of the purchase money in his hands, and that he pay to the complainant as much as would satisfy him for the land lost. A perpetual injunction was granted, and the defendant, trustee, appealed.

Robinson, for the plaintiff.

Patton and Lyons, for the defendant.

By Court, BALDWIN, J. The appellant incurred no responsibility to the appellee by his sale as trustee, under the deed of trust in the proceedings mentioned, of the land thereby conveyed. Acting as trustee, he sold at public auction such property and such title only as were vested in him by the deed, according to the terms therein prescribed, without any warranty; and it is not pretended that in conducting and accomplishing the sale he was guilty of any fraudulent act or misrepresentation, or even fell into any error or irregularity whatever. Nor does the appellee in his bill seek relief against him upon any other ground than the allegation that a part of the proceeds of the trust sale remain in his hands, and ought to be subjected to the equity asserted against the other defendants.

The equity asserted by the appellee is founded upon an alleged deficiency in the tract of land conveyed by the trust deed, arising out of an alleged defect in the title of Richard Hoomes, the grantor therein, to a part of the land embraced within the boundaries thereof. And if that equity can be established, it must be upon the supposition that the grantor and *cestuis que trust* in the deed are to be affected by such defect of title.

In this case the question does not occur, whether the purchaser of such a sale by the trustee is entitled to the benefit of a clause or covenant of warranty in the conveyance from the grantor to the trustee. Here there is no clause or covenant of warranty in the deed; and if the purchaser is entitled to relief, it must be upon the ground of a mistake in regard to the subject-matter of the contract.

We need not consider whether there may not be cases of mistake in respect to the identity of land sold by the trustee with that conveyed by the grantor, which would be proper for relief in a court of equity. Here, if there was any mistake, it was not of that nature. The property sold was the identical property conveyed by the deed; and there was no room for any mistake, unless in regard to the validity of the grantor's title. A mistake in respect to that matter is no ground for relief to a purchaser, where he takes upon himself the risk as to the title, as he does when he purchases land without agreement, express or implied, for a conveyance with warranty of the title.

The principle upon which equity relieves against a mistake in the estimated quantity of land sold has no application to a case like this. The foundation of such relief is, that the price agreed upon by the parties must be presumed to have been influenced by the estimated quantity, unless it appears that they

intended a contract of hazard; and the mistake is corrected not only in cases of deficiency, but also in cases of excess. Here there was no estimate of the quantity as between the trustee and the purchaser, but a mere statement thereof in the grantor's conveyance to the trustee. That statement was mere matter of description, and was no element of the contract between the grantor and the trustee, for which the consideration inured not from the trustee, but the *cestuis que trust*, and was in no wise dependent upon the supposed quantity of the land. The purpose of the conveyance was, that the property should be sold by the trustee, at all events, for whatever it would bring; and the grantor undertook no responsibility either as to title or quantity. If the quantity had turned out after the sale by the trustee to be greater than that mentioned in the deed, neither he, nor the grantor, nor the *cestuis que trust*, could have exacted from the purchaser compensation for the excess; and by parity of reason, they are not responsible for a deficiency.

There is no principle, therefore, whether of defective title or deficient quantity, upon which the appellee is entitled to relief; and it is unnecessary to consider the other questions of law and fact which have been discussed at the bar. And the court is of opinion that the decree of the circuit court is erroneous.

Decree reversed, with costs, restraining order set aside, and bill dismissed, with costs.

CABELL, P., and BROOKE, J., absent.

EQUITY WILL NOT RELIEVE IN ABSENCE OF FRAUD, surprise, or undue influence: *Champlin et al. v. Laytin*, 31 Am. Dec. 382. Whether contract was entered into under mistake of law or fact is not material, where it was clear it was made in good faith; each party possessing equal information, or at least equal means of acquiring knowledge, and neither having practiced towards the other any unfairness or deception: *Juzan v. Toulmin*, 44 Id. 448; *White v. Wilson*, 39 Id. 437; *McCobb v. Richardson*, 41 Id. 374; *Jenks v. Fritz*, 42 Id. 227; *Good v. Herr*, Id. 236; *Trigg v. Read*, Id. 447, and cases cited in the notes.

VENDEE OF LAND IS CHARGED WITH NOTICE OF FACTS RECITED IN DEEDS through which he claims, and is estopped to deny the same: *Talbot's Ex'rs v. Bell's Heirs*, 43 Am. Dec. 126, and cases cited in the note to *Rohr v. Kindt*, 39 Id. 53.

SNEAD v. COLEMAN.

[7 GRATTAN, 300.]

EXECUTOR MAY BIND HIMSELF PERSONALLY to pay the debt of his testator. ACTION OF DEBT MAY BE BROUGHT UPON NOTE, and in such action it need not be averred or proved that there was any consideration for the note. EXECUTOR, WHO MEANS TO LIMIT HIS LIABILITY to pay his testator's debts, should add the words "as executor out of the estate of" testator. CLERICAL ERROR IN MAKING UP RECORD in a lower court should be corrected in that court upon motion, and not by appeal to the higher court.

APPEAL from the circuit court of Henrico county. Action of debt by H. Coleman and his wife against Jesse Snead. The action was founded on a note worded as follows: "\$617.16. On demand with interest from the first day of January, 1840, I promise, as ex'or of John G. Crouch, to pay to Mary G. Crouch six hundred and seventeen dollars and sixteen cents, being a balance due her on settlement of her claims against Thomas, Richard, and John G. Crouch, which she held jointly against them, and is now surrendered on each paying to her their proportions. Witness my hand this 22d day of January, 1840. Jesse Snead, Ex'or of John G. Crouch, dec'd." Judgment was taken against Snead by default, and the clerk in entering the same entered it against Snead personally, and not as executor, whereupon Snead applied for a *supersedeas*, which was granted.

Baxter, attorney general, and Cabell, for the plaintiff.

John Thompson, jun., for the defendants.

By Court, MONCURE, J. The appellant complains that the judgment of the court below was erroneously entered against him in his own right, instead of being entered against him as executor of John G. Crouch. I think the judgment was rightly entered, *de bonis propriis*. An executor may bind himself personally to pay the debt of his testator. But to make him liable, the common law requires that the promise shall be on sufficient consideration; and the statute requires that it shall be in writing. The promise in this case is in writing, and the requisition of the statute is therefore satisfied. Was there a sufficient consideration to support the promise, according to the requisition of the common law? Under our statute, an action of debt may be brought upon a note in writing; and in such action it need not be averred or proved that there was any consideration

for the note: *Peasley v. Boatwright*, 2 Leigh, 195. The note itself imports consideration, as does a bond; the only difference being, that in the case of a bond the consideration can not be inquired into, but in the case of a note it may. The defendant in this case, therefore, might have defended himself on the ground of want of consideration; and if he had sustained such a defense by proof, would have defeated the action. Having made no such defense, the judgment was rightly rendered against him for the amount of the note. Assets in the hands of the executor constitute a sufficient consideration for a promise by him to pay the debt of his testator. So does forbearance to sue, etc. In an action against an executor personally on a promissory note given by him for a debt of his testator, the defendant may show an insufficiency of assets to pay the debt; and if the plaintiff can not show that there was other sufficient consideration for the promise, he must fail in his action. In this way the defendant can sustain no injury. If there be any other consideration for the promise than a sufficiency of assets, then it is consistent alike with justice and the intention of the parties that the executor should be personally liable for the debt. If the consideration depends upon the sufficiency of assets, the executor has the same defense in an action against him personally as he would have in an action against him as executor.

In this case there is not only a promise in writing by the executor; which in an action of debt upon it imports a sufficient consideration; and there is not only an absence of any evidence of want of consideration, which is necessary to defeat such an action on such a promise; but the note itself furnishes express evidence of sufficient consideration. It furnishes evidence of a sufficiency of assets. It contains a promise to pay "on demand." In the language of Dallas, C. J., in *Childs v. Monins*, 6 Eng. Com. L. 228, suppose a demand had been made immediately; does not the executor, by subjecting himself to such a demand, admit he has assets to satisfy it? If he meant to limit his liability, why did he not add to the words "as executor" the words "out of the estate of John G. Crouch"? It also furnishes evidence of forbearance. It contains a promise to pay interest on the debt, which, in the language of the same judge in the same case, "necessarily imports a payment at a future day; and an executor promising to pay a debt at a future day makes the debt his own."

The case thus far is parallel with that of *Childs v. Monins*, just.

referred to; in which it was unanimously decided by the court of common pleas that "a promissory note by which the makers as executors jointly and severally promise to pay on demand, with interest, renders them personally liable." But the note in this case furnishes affirmative evidence of other consideration, which was not furnished by the note in that, and which renders it more reasonable that the executor should be personally liable. It shows that the plaintiff, having a joint claim against Thomas, Richard, and John G. Crouch, "surrendered it on each paying to her his proper proportion." Instead of payment in money of the proper proportion of John G. Crouch, his executor, the defendant, executed the promissory note in question, promising to pay it on demand with interest. The joint claim against the three debtors was thus extinguished. The original obligation of the testator for the whole claim was discharged; and in lieu thereof a new security was taken from the executor for the payment of his testator's proportion on demand, with interest. Was not this surrender of the original claim, this extinguishment of a joint debt of three, a sufficient consideration for a promise by the executor of one of them to pay one third of the amount of the debt? The original debt may have been a debt of higher dignity against the testator's estate than the note would be. It may have been due by judgment or bond. At all events, it was a joint debt of three. Would the plaintiff have surrendered such a debt without being assured of the certain payment of the different proportions of the parties? Would she have taken a security for the proportion of one of them which might embarrass her with a future inquiry as to the sufficiency of assets? Her subsequent conduct proves that she reposed with confidence on the promise of the defendant to pay his testator's proportion with interest on demand. She waited more than four years before she made the demand. Would she have so waited if the demand had been against a decedent's estate? In the language of the same judge whose language I have before quoted, "if executors were not liable on such a promise, they would be enabled by making such a promise to defraud any individual among their testator's creditors." The case of *Childs v. Monins* was cited with approbation by Chief Justice Sharkey in delivering the opinion of the court in *Sims v. Stilwell*, 3 How. (Miss.) 176. See also *Bradly v. Heath*, 3 Sim. 543; 5 Cond. Eng. Ch. 241; *Bank of Troy v. Topping*, 9 Wend. 273.

The note in this case being a good cause of action against the executor personally, the declaration is sufficient to charge him personally, though it complains of him "as executor," and charges the promise to have been made by him as such. "Where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising as executor:" 2 Williams on Ex., 1096. The naming the defendant executor in the declaration in such case is surplusage: Id. 1101. In this case not only is the nature of the debt such as to charge the executor personally, but it would seem from the declaration that it was intended thereby so to charge him. The words "as executor of John G. Crouch" seem to have been used therein as matter of description. The declaration is in the *debet* and *detinet*. And the breach is charged against the "defendant" without any addition to that term.

But suppose the judgment ought to have been *de bonis testatoris*, would it be proper to reverse the judgment on that account? I think not. The judgment in the case was an office judgment, which, not having been set aside, became, by operation of law, a judgment of the succeeding term. In such a case the only entries usually made after the declaration is filed, and before the execution issues, are two short entries in the rule book, one in the words "common order," and the other "common order confirmed." These entries are identical, whether the suit be against the defendant in his own right, or *en autre droit*. The execution is issued upon the judgment as if it had been rightly entered in full. The clerk afterwards at his leisure enters a formal judgment in the case in a book kept for the purpose. The error, if any, in running out these short entries into form when the record is made up, is nothing but a clerical error, the correction of which belongs to the court whose officer committed it. The remedy is by motion to that court, and not by appeal to this: *Eubank v. Rall*, 4 Leigh, 308; *Shelton v. Welsh*, 7 Id. 175; *Digges v. Dunn*, 1 Munf. 56. I am for affirming the judgment.

DANIEL, J., concurred in the opinion of MONCURE, J.

BALDWIN and ALLEN, JJ., dissented.

CABELL, P., absent.

EXECUTORS MAY COMPOUND DEBTS, OR ENTER INTO ARBITRATIONS, and their acts will be upheld, if they are fair, beneficial to the estate, and free

from fraud, negligence, or misconduct: *Bailey v. Dilworth*, 48 Am. Dec. 760, and note.

JUDGMENT MAY BE AMENDED IN COURT RENDERING THE SAME: *Smith v. Redus*, 44 Am. Dec. 429, and cases cited in the note.

CRUMP v. UNITED STATES MINING Co.

[7 GRATTAN, 352.]

DECLARATIONS AT TIME OF MAKING CONTRACT are part of the *res gestæ*, and may be given in evidence in an action to enforce it, where the defense is that it was procured by false and fraudulent representations.

EVIDENCE OF ACQUIESCENCE IN CONTRACT PROCURED BY FRAUD can not be used by way of estoppel for the purpose of excluding evidence showing that the same was procured by false and fraudulent representations.

APPEAL from the circuit court of Henrico county. Debt. Action brought by the United States Mining Company against Crump and Liggon. There were twenty-eight other cases involving precisely the same questions submitted at the same time and on the same facts. The facts in the bill of exceptions on which the decision turns are found in the opinion.

Robinson and Lyons, for the appellants.

B. B. Minor and Patton, for the appellees.

By Court, BALDWIN, J. The question presented by the second bill of exceptions taken at the trial is, whether the circuit court erred in rejecting the evidence offered by the defendants in these actions for the purpose of proving that the contract upon which the actions are founded was procured from them respectively by false and fraudulent representations made to them at the time, as to the description, condition, and value of the subject by Williams, the agent of the plaintiffs. And the question must be considered upon the hypothesis that the defendants were able and ready to prove such false and fraudulent representations so made at that time. The first step in the order of such proof was of necessity evidence of the declarations and conduct of the agent at the time the contract was entered into; and the decision of the court excluding the representations so made by him assumes the proposition that though the contract in question was so fraudulently procured from the defendants, it is nevertheless obligatory upon them.

It can not be doubted that where a contract is made between parties acting for themselves as principals, and in an action founded upon it, the defense is that the contract was procured by the false and fraudulent representations of the party seeking

to enforce it, his conduct and declarations at the time are parts of the *res gestæ*, and essential elements of the defense. If, therefore, the decision of the court below can be sustained, it must be upon the ground of a distinction, applicable to these cases, between the effect of such a fraud when perpetrated by a principal and its effect when perpetrated by an agent.

The question whether an agent has transcended the authority conferred on him by his principal in making a contract usually arises where the other party is seeking to enforce it, and the agent's want of authority is relied upon by the principal as matter of defense against the performance of the contract on his part. But in the present cases, the principals demand the performance of the contract by the other parties, and of course recognize the authority of their agent to procure it, but deny that they can be affected by the alleged false and fraudulent representations employed by him for that purpose. This denial rests upon the alleged ground that Williams was an agent of limited powers, restricted by his principals from making any representations, true or false, on the subject of the contract, and made the mere medium for communicating to purchasers the terms of sale proposed by his principals, and their own representations of the description, condition, and value of the property.

But the admissibility of evidence to prove the procurement of a contract by the fraudulent practices of an agent does not turn upon the extent of the limitations of his authority; for if so, then as the principal may in most cases recognize and confirm the authority of the agent, the consequences of his misconduct would be visited, not upon the person whose confidence enabled him to commit the fraud, but upon its innocent victim. The fraudulent conduct of the agent in procuring a contract may be an abuse of his known authority, or it may be accomplished by means of the suppression or concealment of the limitations upon it; and in neither case can his principal give validity to the contract by repudiating the fraudulent practices employed to obtain it.

That a person professing to act as agent for another does so wholly without authority, or transcends the authority actually conferred upon him by his principal, is no reason for enforcing the contract against the other party when obtained from him by false and fraudulent representations. In the words of a judicious writer: "Contracts made for the benefit of another, but without his privity or consent, may be rejected or affirmed at his election. But by making the election to affirm it he adopts

that which is detrimental, as well as that which is for his benefit. And in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent, affects the principal's right to recover." Paley on Agency, 324, 325.

That an agent to sell is restricted in the delegation of his authority by his principal from making any representations on the subject of the contract, whether true or false, has, it is true, a bearing upon the obligatory force of the contract; but it is as a question of fact, and not as a question of law. It may be used in evidence as tending to prove that the representations of the agent, though false and fraudulent, had not the effect of deceiving the purchaser. But this presupposes that the restraint upon the authority of the agent was known to the purchaser; and whether he knew it, and the effect of such knowledge in preventing him from being deluded, deceived, and defrauded, are also questions of fact for the consideration of the jury.

It is difficult to conceive a case of an action founded upon a contract of sale, to which the defense is that it was obtained by fraud, in which the acts and declarations, whether of the principal seeking to enforce the contract or of his agent through whose intervention it was procured occurring at the time of making it as part of the *res gestæ*, are inadmissible evidence. Such a defense does not present a naked question of law for the decision of the court; but a mixed question of law and fact for the consideration of the jury, with the aid of such instructions as the court may give in regard to the principles of law applicable to the facts that may be proved to the satisfaction of the jury.

The bill of exceptions shows nothing to render these cases an exception to the general rule of evidence just mentioned. It appears therefrom that the contract in question consisted of a written prospectus on the part of the plaintiffs, in the form of a subscription paper, to be signed by the purchasers, for the sale of a number of shares of reserved stock of their gold mining company, upon the terms and conditions therein prescribed, representing the mines to be in full and successful operation, with several particulars of description and recommendation, and referring to the last report of the president and directors of the company for a full description of the mine, buildings, machinery, etc., which subscription paper was signed

by the defendants and others. The plaintiffs also gave in evidence a report of the president and directors of the company to the stockholders, containing a detailed and favorable description and statement of the condition of the mining property and of the operations, resources, and prospects of the company, as being the report referred to in the prospectus; but it does not appear that it was shown to defendants, or was called for by them; or that the prospectus itself was read to or by them; except so far as it may be inferred from their having subscribed it. It further appears that Williams was an agent of the company for effecting the contemplated sales of the stock upon the terms and conditions prescribed in the prospectus; but the extent or limitations of his authority do not appear, except so far as may be inferred from the facts above mentioned, and the recognition of his agency by the act of the company in seeking to enforce the contract in question. Upon this state of facts, the defendants offered to prove that Williams, at the time of procuring the subscription of stock from them, and for the purpose of inducing them to subscribe for and purchase the same, made representations, in addition to those contained in the prospectus and report therein referred to, as to the description, condition, and value of the gold mine, upon the faith of which the defendants became subscribers for said stock; which representations were false and fraudulent; and for the purpose of getting such proof, asked a witness to state what representations were made to the defendants as aforesaid touching the value and description of the mine and condition of the company: whereupon the counsel for the plaintiffs objected to the question and any answer thereto, upon the ground that it was incompetent for the defendants to give evidence of any representations by said Williams, because they insisted that he was a limited agent, whose authority was defined by the said prospectus and the report of the president and directors therein referred to.

We are of opinion, for reasons above suggested, that the circuit court erred in rejecting the evidence so offered by the defendants, upon the ground urged on the part of the plaintiffs, and if the propriety of its rejection on any other ground could be considered by this court, as to which we express no opinion, none such appears from the bill of exceptions. The evidence relied on by the plaintiffs as proving acquiescence in and recognition of the contract on the part of the defendants was proper for the consideration of the jury, in connection with all the circumstances of the case, and the principles of law applicable thereto; but

could not be used by way of estoppel, for the purpose of excluding the evidence of fraud offered by the defendants.

The court is further of opinion that the circuit court did not err in the rejection of the declarations of Jackson, the president of the company, as stated in the third bill of exceptions, upon the assumption made by that court that he was identified as the person who made them; inasmuch as it does not appear that he acted as the authorized agent of the company for the purpose of making sales of the stock above mentioned.

And the court is further of opinion that there is no error in the several decisions of the circuit court rejecting proposed instructions, nor in the actual instructions given, as set forth in the several bills of exception in relation thereto.

The court therefore, without considering whether the bill of exceptions to the refusal of the circuit court to grant a new trial was properly taken, is of opinion that the judgments must be reversed for the error of that court in rejecting the evidence offered of the declarations of Williams, as stated in the second bill of exceptions.

Judgments reversed, with costs to the plaintiffs in error, verdict set aside, and new trial directed.

CABELL, P., and MONCURE, J., absent.

ADMISSIBILITY OF DECLARATIONS AS PART OF RES GESTÆ.—Declarations accompanying an act are admissible as part of the *res gestæ*: *Deming v. Carrington*, 30 Am. Dec. 591; *Ross v. Bank of Burlington*, 15 Id. 664.

ESTOPPEL IN PAIS ARISING FROM ACTS, ADMISSIONS, AND CONDUCT.—For a discussion of this topic, see the following cases and notes: *Welland Canal Co. v. Hathaway*, 24 Am. Dec. 51; *Cook v. Grant*, 16 Id. 564; *Wells v. Higgins*, 13 Id. 235; *Buchanan v. Moore*, 15 Id. 601; *Crest v. Jack*, 27 Id. 353; *Abney v. Kingsland*, 44 Id. 491.

CASES
IN THE
GENERAL COURT
OF
VIRGINIA.

HUNTER v. COMMONWEALTH.

[7 GRATTAN, 641.]

CONFESSION OR DECLARATIONS OF ACCOMPLICE made after the commission of the offense are evidence against him only unless made in the presence of his partners in the crime.

WHERE ONLY COVERING TO OPENING FOR WINDOW is a cloth hung over two nails at the top, and loose at the bottom; whether the removal of the cloth from one of the nails is a sufficient breaking to constitute burglary, *quære*.

BURGLARY. Appeal from the circuit court of Lee county. The facts are sufficiently stated in the opinions.

Grattan, for the plaintiff.

By Court, THOMPSON, J. It is the unanimous opinion of the court, that it was erroneous in the court below to admit the confessions, admissions, or declarations of Hardy as evidence against the prisoner, even though a previous conspiracy and combination had been proved; because it appears, from the bill of exceptions, that they were made after the arrest, and consequently after the commission and completion of the offense charged: 1 Greenl. Ev. 268, 269; Roscoe's Cr. Ev. 38, 39. A majority of the court deem it unnecessary, and therefore decline to express any opinion upon the sufficiency of the evidence certified, to establish such a breaking as to constitute the crime of burglary, or upon any of the other questions presented by the prisoner's petition and assignment of errors. The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial, and the proper order for the removal of the

prisoner, who is now confined in the penitentiary, to the county of Lee for trial.

FIELD, J. The prisoner was convicted of burglary in the circuit court of Lee county, and sentenced to confinement in the penitentiary for five years, one twelfth part of which he was to be confined in a solitary cell thereof. Upon the trial, the confessions of Hardy, an accomplice in the perpetration of the crime, which were made after its commission, were given in evidence against the prisoner, which he objected to, and asked the court to exclude. The court declined deciding the question then, and postponed it until all the testimony should be heard. And after the testimony had been closed, the court instructed the jury, "that if they believed from the evidence that the prisoner and Hardy were accomplices (or had entered into a conspiracy to commit the offense), then they were to regard Hardy's confessions as good evidence against the prisoner, otherwise not." I do not remember the precise language of the instruction. The above is the substance of it. The jury rendered a verdict of guilty. The prisoner moved for a new trial, which was overruled, and a bill of exceptions signed, which sets out the facts proved upon the trial. I am of opinion that the court erred in not deciding the question as to the admissibility of the confessions of Hardy. This was a question of law, which it was the province and duty of the court to decide, and not refer it to a jury. These declarations were improperly received as evidence against the prisoner. The confessions or declarations of an accomplice or confidant, made when they were in the act of committing an offense, or when in its way of commission, can be received as evidence against all parties to the conspiracy. But after the commission of the act is complete and over, declarations subsequently made by an accomplice are good evidence against him only, unless made in the presence of his partners in the crime. I am also of opinion that the facts set forth in the bill of exceptions do not amount to burglary: See *Rex v. Lawrence*, 19 Eng. Com. L. 490. For these three errors I think the judgment should be reversed, the verdict set aside, and a new trial awarded. Believing that the offense proved upon the trial does not amount to burglary, I deem it unnecessary to say anything about the non-residence of the prisoner, and his being absent from the state when the offense charged in the indictment was committed.

I will further remark, that so much of the sentence as re-

quires confinement in a solitary cell of the penitentiary is irregular, the law upon this subject having been repealed.

CONFESSIONS OF ACCOMPLICE, WHEN ADMISSIBLE: *State v. Soper et al.*, 33 Am. Dec. 665; *State v. Crank*, 23 Id. 117.

BURGLARY, WHAT CONSTITUTES: See *State v. McCall*, 39 Am. Dec. 314.

PERKINS v. COMMONWEALTH.

[7 GRATTAN, 651.]

INDICTMENT FOR FORGERY OF PROMISSORY NOTE need not set out the indorsements, or any other matter written upon the same paper constituting no part of the note itself, and not entering into the essential description of that instrument.

WHETHER PROMISE TO PAY IS IN PAST OR PRESENT TENSE, in a negotiable promissory note, it will not lose its character as such, although a bank may be deterred from discounting it.

VERDICT WILL NOT BE SET ASIDE where a court, in response to an inquiry propounded by a jury, correctly state the law.

HENRY T. PERKINS was indicted for forgery in the circuit court of Henrico county. The first count in the indictment set out the note in full; the remaining two counts charged the forgery, but none of the counts referred to the indorsements on the note. During the trial Perkins objected to the introduction of the note, that there was variance between the allegations and the proof. The objection was overruled. After the case had been given to the jury, they returned into court and asked to be instructed as to whether it was necessary that they should be satisfied that the prisoner did actually and personally forge the paper charged in the indictment in order to convict. The court instructed the jury, that if from the evidence they were satisfied that the prisoner either actually and personally made the forged instrument, or was actually present, aiding, abetting, and assisting with a felonious intent when the forged writing was made, they must find him guilty. The prisoner excepted to the ruling. The prisoner was found guilty, and appealed.

R. R. Howison, for the plaintiff.

By Court, LOMAX, J. The court is of opinion that, as this prosecution was only for forging the writing which purported to be a negotiable note, there was no necessity that the indictment should set out the indorsements, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instru-

ment. It is enough to set out in the indictment the note itself, without any other extrinsic marks or writings upon the same paper: *Commonwealth v. Ward*, 2 Mass. 397; *Simmons v. State*, 7 Ohio, 116. When the paper with these unessential marks and writings is offered in evidence, for the purpose of sustaining the prosecution for the forgery of the note, there will be no valid objection on the ground of variance between the proofs and the charges laid in the indictment: *Stark. Cr. Pl.* 113; *Rex v. Testick*, in note *f* to *Rex v. Gibbs*, 1 East, 180; 1 East Cr. L. 925; *Commonwealth v. Adams*, 7 Met. 50; *Commonwealth v. Searle*, 2 Binn. 332 [4 Am. Dec. 446]; *Commonwealth v. Ross*, 2 Mass. 373.

Nor is there any ground for the exception that the negotiable note, which is truly set out, contained the acknowledgment of the promise to pay in the past tense, instead of the usual promise in the present tense. Whether it was in the past or present tense, it was equally a negotiable promissory note: *Commonwealth v. Parmenter*, 5 Pick. 279. Nor would the paper lose the character of a negotiable promissory note, as charged in the indictment, because there should be anything in the frame of the note which might, for want of some conformity to the practice of the bank, deter the bank from discounting the note. It was not less a negotiable promissory note though the bank might refuse to negotiate it.

Nor is there any ground for the exception, stated as the third, in the petition. The instruction given by the court was a direct response to the inquiry, which was propounded by the jury, for settling their doubts, according to the views taken by them of the evidence in the case. The matters of law, stated by the court in that instruction, were correctly stated. Even if it might seem to others than the jury to be an instruction upon what might be deemed abstract and foreign from the case, yet the verdict ought not to be set aside on that account; the judgment of the court being right upon the question submitted to it by the jury.

Another exception stated in the petition to the proceedings of the court below is the refusal of the court to award a new trial, it being alleged that the evidence in the record is insufficient to sustain the verdict. It is abundantly proved that the note was forged; and that the note so forged was in the possession of the accused; and that he was seeking to utter it, and to derive benefit from it. When the forgery was detected, he offered no explanation whatsoever in regard to the paper—how

or when it came to his hands—nor of any of the circumstances connected with the paper, or his possession of it. He made no attempt to offer any such explanation. By whom the forgery of the paper was committed, whether by the accused or some other person, was a question of fact for the jury to decide upon, after weighing all the proofs and circumstances of the case. It was so held by Story, J., in *United States v. Britton*, 2 Mason, 464; and seems so to have been held in *Spencer v. Commonwealth*, 2 Leigh, 751.

The rule of evidence in such cases was laid down in the supreme court of North Carolina in the case of *The State v. Britt*, 3 Dev. L. 122; and in the case of *The State v. Morgan*, 2 Dev. & B. L. 348. Ruffin, C. J., in delivering the opinion of the court in the latter of these cases, maintained that the accused being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself, or by false conspiracy with others, he forged or assented to the forgery of the instrument—that he either did the act or caused it to be done, until he showed the actual perpetrator, and that he himself was not privy. A distinction was taken between having such paper, as a forged order, in possession, and having a counterfeit bank note—an instrument current in its nature, and which might well come innocently to any one's hands. In the case of the forged order, he who holds it under such circumstances, it was said, should be taken to be the forger, unless he shows the contrary. And it was moreover said, in one of the cases cited, that with the exception of such papers as pass from hand to hand in the common transactions of life, the uttering of a forged paper, if unexplained, is in sound sense evidence of the forgery of the paper by the utterer.

In the present case, it was proved that the indorsement of Gault, as well as the note itself, was forged. Although in the order of indorsements his name precedes the indorsement of the payee, he must be regarded as the pretended indorsee of the payee; and the title of the accused must be regarded as derived under this forged indorsement of Gault's name. This case does not require the court to decide what is the degree of proof, or the character of the proof, as being presumptive or *prima facie*, which is furnished against the accused as the forger, by the mere circumstance that the instrument was forged, and that he was endeavoring to utter or to use it for his own benefit. These circumstances it was the province of the jury to weigh, as important proofs against him; and to combine them in their con-

sideration of the case with the circumstance of the forged instrument, and the total omission on his part to offer any exculpatory explanation whatsoever. In combination with these or any other circumstances before the jury, the evidence tended with powerful effect to convict the accused, as charged in the indictment, with having forged the note. In the exercise of its appellate jurisdiction in a criminal prosecution, this court can not, without violating the authority of precedent decisions in such cases, interpose to disturb or set aside the verdict which has been rendered by the jury in this case. It can not pronounce that the court below erred in refusing to grant a new trial.

The writ of error applied for is refused.

FORGERY DEFINED: See *State v. Phelps*, 34 Am. Dec. 672; *Barnum v. State*, 45 Id. 601; *State v. Jones*, 36 Id. 257, and note.

ERROR IN REGARD TO INSTRUCTIONS OF COURT to jury, when it manifestly causes no injury, is not ground for a new trial, nor will it vitiate the verdict. See *People v. Cunningham*, 43 Am. Dec. 709, and note thereto.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

NEWBROUGH *v.* WALKER.

[8 GRATTAN, 16.]

IN ACTION OF COVENANT FOR FAILURE BY LESSOR TO DELIVER to the lessee possession of premises rented by the latter; and where the latter has not sustained any special damage, the lessee is entitled only to general damages, and the measure of such damages is the difference between the rent contracted to be paid and a fair rent for the property at the time when it should have been delivered up.

APPEAL from the circuit court of Frederick county. Action of covenant brought by R. S. Walker against J. Newbrough. The declaration set out that Walker rented Newbrough's mill, and after making the agreement, Newbrough rented the mill to B. Ford, who went into possession, thereby preventing Walker from entering. Newbrough demurred, but the demurrer was overruled. A verdict was rendered in favor of Walker for two hundred and fifty dollars damages, and Newbrough appealed. The other facts appear in the opinion.

Cooke, for the appellant.

By Court, MONCURE, J. The court is of opinion, that the circuit court did not err in overruling the demurrer to the declaration; but did err in overruling the motion for a new trial. On the facts proved and certified in the cause, the jury was warranted in finding a verdict for the plaintiff in the court below; but the damages awarded were excessive. The defendant in the court below seems to have acted in good faith, and his breach of contract for which the suit was brought seems to have been

the result of misunderstanding on his part. He derived no benefit from such breach, but on the contrary, rented out the property for twenty-five dollars less than the plaintiff was to have given him. It was not averred in the declaration or proved on the trial that the plaintiff sustained any special damage by reason of the defendant's breach of contract. The plaintiff did not lose his situation; but continued in the same business in which he was engaged when he entered into the contract. The tenant to whom the property was rented offered, a few days after the renting and before he had received or purchased any wheat, to let the plaintiff have it on the same terms on which said tenant had rented it; but the plaintiff declined to accept the offer. Under these circumstances the plaintiff was entitled only to general damages, and the measure of such damages is the difference between the rent contracted to be paid and a fair rent for the property at the time when it should have been delivered to him. It was proved that three hundred dollars, the rent stipulated in the lease to the plaintiff, was a fair rent for the property. On the other hand, it was proved by a witness that he offered the plaintiff one hundred dollars for his lease, which he refused to take. If upon this evidence the jury had found a verdict for one hundred dollars damages, this court would not have disturbed the verdict. But there is nothing in the case which warrants a verdict for greater damages than one hundred dollars. The evidence of a witness that during the first year of the lease the plaintiff could have cleared three or four hundred dollars was necessarily speculative and conjectural, and furnished no legitimate basis on which to estimate the damages. It is therefore considered by the court that the judgment of the circuit court be reversed and annulled, with costs to the plaintiff in error; that the verdict of the jurors be set aside; and that the cause be remanded to the circuit court for a new trial to be had therein.

CABELL, P., absent.

MEASURE OF DAMAGES FOR BREACH OF EXECUTORY CONTRACT: See cases collected in the notes to *Masterton v. Mayor of Brooklyn*, 42 Am. Dec. 33, and *Rohr v. Kindt*, 39 Id. 53.

LUSTER v. MIDDLECOFF.

[8 GRATTAN, 54.]

OFFICIAL BOND OF EXECUTOR which contains the names of the executor and several sureties in the penal part, and there is no blank for an additional name, and which is signed by those whose names appear in the penal part and that of another person, it will be treated as the bond of the person who executed it, notwithstanding the absence of his name in the penal part.

WHERE LEGATEE IS DEAD, the decree for the distribution of the estate should be in favor of his personal representative.

BILL filed by John Middlecoff against Jacob Carper, executor, John Luster, A. C. Dempsey, and others as sureties for obtaining a settlement of account of executor and distribution of estate. The executor being insolvent, action was brought on his bond. The penal part of the bond was as follows: "Know all men by these presents that we, Jacob Carper, Joseph K. Pitzer, John Luster, and Matthew S. Robinson, are held and firmly bound," etc. This bond was signed by the parties named and Absalom C. Dempsey. It appears that in the blank space for sureties' names there was no room for Dempsey's name. Dempsey demurred to it being his bond, inasmuch as his name was not in the penal part. The demurrer was sustained, the bill dismissed as to Dempsey, and Luster appealed.

Lackland and Cooke, for the appellant.

F. T. Anderson, for Dempsey.

J. T. Anderson, for Middlecoff's legatees.

By Court, BALDWIN, J. The court is of opinion that upon the face of the bill of the plaintiffs, and of the official bond of Jacob Carper, executor of John Middlecoff the elder, therewith exhibited, the defendant Dempsey must be regarded as one of the sureties in the said bond, he appearing to have executed the same, although his name is not therein mentioned as one of the obligors; and therefore that the circuit court erred in sustaining the said Dempsey's demurrer and dismissing the bill as to him, instead of overruling said demurrer, and requiring him to answer the bill, which error is to the prejudice of the appellant and of the appellees Pitzer and Robinson. And the court is further of opinion that there is no other error in the decree of the circuit court, unless it be in decreeing in favor of the children and heirs of John Middlecoff the younger, and the children and heirs of George Middlecoff, instead of their personal representatives; it

being uncertain from the record whether the said John Middlecoff the younger and George Middlecoff, the sons and legatees of the said John Middlecoff the elder, died before or after the death of their father; and unless it be in the omission of the decree to state that the recovery in favor of Thomas J. and Harriet Middlecoff, infant children and heirs of the said John Middlecoff the younger, is by their guardian and next friend: in regard to which alleged errors no action of this court need be had, inasmuch as for the error above declared in sustaining the demurrer of said Dempsey, the decree must be reversed and the cause remanded to the circuit court for further proceedings to be there had, and any such irregularities may be there corrected, after inquiry into the facts bearing thereupon. It is therefore adjudged, ordered, and decreed, that so much of the said decree as sustains the demurrer of the said Dempsey and dismisses the bill of the plaintiffs as to him be reversed and annulled, with costs to the appellant against the appellees who were plaintiffs, and said Dempsey. And it is further adjudged, ordered, and decreed, that the said demurrer be overruled, and that the said Dempsey do answer the bill of the plaintiffs; and that the reports of the commissioner in regard to the matters of account be recommitted in order that the same may be reformed, in respect to any responsibility which may appear on the part of the said Dempsey or to any errors therein which may be shown by him. And the cause is remanded to the circuit court to be proceeded in as above indicated.

CABELL, P., and MONCURE, J., absent.

DEFECT IN BOND OF ADMINISTRATOR will not vitiate his appointment or invalidate his acts: *Peebles v. Watts' Adm'r*, 33 Am. Dec. 531.

HIGGINBOTHAM v. CORNWELL.

[8 GRATTAN, 83.]

DOWER, PROVIDED BY LAW IN BEHALF OF WIDOW, IS PARAMOUNT to all conveyances, contracts, incumbrances, debts, or liabilities of the husband executed or incurred by him during coverture.

WHEN HUSBAND DURING COVERTURE SELLS AND CONVEYS LAND with general warranty and his wife did not join in the deed, and the husband afterwards willed the whole estate, real and personal, to his wife for life, remainder to his children, she will not only be entitled to take under the will, but also be allowed her dower in the land sold.

IN ORDER THAT PROVISION FOR WIFE in her husband's will shall be held to be in lieu of dower, the will must so declare in terms.

APPEAL from the circuit court of Monroe county. The facts are stated in the opinion.

N. Harrison, for the plaintiff.

Lackland, for the defendant.

By Court, BALDWIN, J. It appears in this case from the testator's will, that after charging his estate, real and personal, with the payment of his debts, he devised the same to his wife for life, with remainder to his children. Upwards of thirty years before the making of his will he had sold and conveyed, with general warranty, a tract of land to the appellee, but his wife did not unite in the conveyance. The sale and conveyance to the appellee are in no wise mentioned or alluded to in the will. Shortly after the testator's death this suit was brought by the appellant to recover her dower in the land so sold and conveyed to the appellee. And the defense made by the answer is, that the widow is barred of the dower claimed by the provision made for her in the will, which was intended by the testator to be in lieu of dower of all the lands which he at any time owned; which provision it is averred she has accepted. The will of the testator and his deed of conveyance to the appellee are the whole evidence in the cause. And the question presented by the record is, whether the widow is entitled to recover the dower claimed, and also to retain the provision made for her by the will. If she is, then her acceptance or refusal of that provision is a matter wholly immaterial.

The dower provided by law in behalf of a widow, by which is secured to her one third of all the lands of her husband of which he was at any time seised during the coverture, is paramount to all conveyances, incumbrances, contracts, debts, or liabilities of the husband. But as there is no obligation upon him to make a greater provision for her than that which is conferred by the law, it is competent for him, in the exercise of his testamentary power in her behalf, to couple it with the condition that it shall be a substitute for and stand in lieu of her legal dower in the whole or any part of his estate, and thus propose to become the purchaser of the latter; and then if she accepts the devise, she takes it with the condition thereto attached; or if she rejects the condition, she thereby rejects the devise itself: and so she can not have both the legal dower and the devise which she accepts as its substitute. And the devise in her favor may thus be made conditional by its express terms, or by a clear and necessary implication of the testator's intent to that

effect, to be derived from the will. But as the exercise of a testator's testamentary bounty in behalf of his wife, beyond or irrespective of the provision made for her by law, is natural and frequent, it is not allowable to infer an intent on his part to the contrary from other parts of the will, by conjecture or probability: the conclusion ought to be as satisfactory as if it were expressed.

This clear and necessary implication, which puts the widow upon her election, is to be derived from provisions of the will, which would be defeated or disturbed by allowing her to claim in both characters of devisee and dowress: for example, if a testator devises his estate, or a part of it, to his wife and others, to be equally divided amongst them, the equality required would be defeated if she were permitted to claim one third of the property so devised as her dower, and also a third of the remaining two thirds under the will. But a mere disappointment of the expectations of others under the will does not put the widow to her election: as in the case of a devise by the testator to her of a specific part or portion of a farm, say a moiety, and of the other moiety to his children; in that case the widow may take her moiety under the will and one third of the other moiety under the law, though it may perhaps have been his design that she should have but a moiety of the whole; there being no plain and necessary implication that the children were not to take subject to her right of dower.

In the present case, the purchaser from the testator in his lifetime was in no wise an object of his testamentary care or bounty. There is no devise to him of the property he had purchased, nor any indemnity provided for him by the will against the assertion of the widow's right of dower. That right of dower was not and could not have been even conveyed to him by the husband, and it is only by force of the warranty express or implied of the latter that he could have any claim against his estate for compensation, in the event of eviction by the paramount claim of the widow. Such a liability of the husband's estate under his contract stands upon the same footing as his debts and contracts generally, and furnishes no implication of an intent on the part of the husband to bar his widow's right of dower, by the provision made for her by his will. A testator is understood to speak of his real property as of the date of his will, and of his personal property as of the time of his death; and how can we know in this case that the testator had in his mind at the date of his will real property which was no longer

his, but had been sold and conveyed by him many years before to another; or if it was present to his thoughts, that he recollected the failure of his wife to unite in the deed to the purchaser? or if he did, how can we safely infer an intent to deprive her of her lawful right in the subject by a testamentary provision in her favor in regard to his remaining property?

Nor is there any incompatibility of a liability of the husband's estate, by reason of the widow's eviction of the purchaser, with the provisions of the will. The devise to her, it is true, is of all the testator's real and personal estate during her life; which is liable to be diminished by a claim of the purchaser, if he should choose to assert it, upon the covenant of warranty in the deed. But there is no repugnancy in such diminution of the value of her interest in the estate under the will, nor of that of the devisees in remainder, if that were material, with the assertion of her right of dower against the purchaser; and indeed, it is entirely compatible as well with the charge upon it in the will in behalf of creditors, as with that which is given them by operation of law.

It can not be that the claim of a purchaser from the husband in his life-time, founded merely upon the warranty of the latter, to compensation out of his estate, in case of eviction by the widow, falls within any rule of equity requiring her to elect between her right of dower under the law and the provision made for her in the testator's will: for in equity the rule of election is also a rule of compensation, and not one of forfeiture. It is applicable only to the case of a beneficiary under the will, the provision in whose favor is defeated by the enforcement of the claim against the will; and then invariably the defeated devisee or legatee receives compensation out of the claim under the will, so far as it may extend or be requisite, of the claimant who defeats him; and if there be any surplus, the latter is entitled to receive it. Now, how can such compensation be made to a purchaser from the husband in his life-time? He is not designated in the will as is the case with the defeated devisee or legatee; and can be no more entitled to the compensation than any other purchaser from the husband. Suppose, then, the fund for compensation be exhausted by the claim of such a purchaser, where is another purchaser of other land from the husband to look for redress? and by what rule can he be relieved, unless it be by a rule of forfeiture?

The court is therefore of opinion that the decree of the circuit court is erroneous in dismissing the appellant's bill, instead

of sustaining and enforcing her claim of dower, and extending to her such other and consequent relief as may appear she is entitled to; therefore reversed with costs, bill reinstated, and cause remanded for further proceedings in conformity with the foregoing opinion and decree.

CABELL, P., absent.

WIDOW'S RIGHT TO DOWER, HOW AND WHEN BARRED: See *O'Brien v. Elliott*, 32 Am. Dec. 137; *Sellman v. Bowen*, 29 Id. 524; *Church v. Bull*, 43 Id. 754, and notes.

MEEKS' ADM'R v. THOMPSON.

[8 GRATTAN, 134.]

WHERE CHARGE ON LAND BY WILL is for the payment of debts in general, the purchaser from the executor or administrator is not bound to see to the application of the purchase money.

THIS case came up on appeal in 1836, under the title of *Thompson v. Meek*, was sent back the same year, and is reported in 7 Leigh, 419. The facts are about as follows: James P. Thompson, by his last will, directed, first, that his funeral expenses and all his just debts be paid; secondly, that certain lands which he specified be sold by his executors, and the money appropriated to the payment of debts. He then devised a particular tract of land to his son and daughter, and afterwards directed, if necessary for the payment of his debts, that a certain negro boy be sold for that purpose; and if these were insufficient for the payment of his debts, he directed that a part, the least in value, of the tract given to his son and daughter, be sold to fully satisfy and pay all his just debts. The question to be determined was the manner in which the will should be construed. The court held that the testator's meaning was, that all his debts should be fully satisfied, and so much of the tract of land last mentioned be sold as would effect the purpose, even though it might take the whole; but that before any part of the tract was sold the other property specifically appropriated to the payment of debts ought first to be applied to that object. It appears that Meeks purchased a part of the Thompson property under foreclosure of mortgage, and the administrator of Thompson's estate was charged with the purchase money. Meeks also had a claim against the estate. The commissioner, in rendering his report to the court, refused to allow Meeks several credits,

and when the cause came up for trial in 1845, the court ordered the sale of the land to Meeks to be set aside, and a new sale made to satisfy the outstanding liabilities of Thompson's estate. An appeal was taken by Meeks' administrator. The other facts appear in the opinion.

B. R. Johnston, for the plaintiff.

Fulton, for the defendants.

By Court, ALLEN, J. It appearing that when this case was before this court on a former occasion, it was held that the grant of administration with the will annexed to William P. Thompson was not a void grant, and that the administrator was empowered to make sale of the land charged by the testator with the payment of his debts; and that as the will charged all the lands, the administrator was authorized to sell the whole thereof if such sale became necessary to pay the debts; this court is of opinion that in the case of such a general charge upon the lands it was not incumbent on the purchaser to look to the application of the purchase money. If the condition of the estate rendered such sale necessary at the time the same was made, and the sale was fair, and the purchase money has been paid, the failure of the administrator to account for and pay over the proceeds to the creditors of the estate should not impair the title of the vendee. The sale in the present case is shown to have been for a full price; and the only inquiry left open by the decree of this court is whether the sale was necessary for the payment of the debts of the testator. In determining this question it is necessary to ascertain what debts were chargeable to the estate, and whether the same could have been discharged without a sale of the land in the proceedings mentioned sold to Joseph Meeks. To the debts appearing due and credited in the administration account, there should, in the opinion of this court, have been added the debt of five hundred and thirty-five dollars paid to H. Smith, the marshal, being the amount of the mortgage on a part of the land sold to Meeks; and also the debt due to Sayers, designated in the fourth exception of the appellants. And there should have been deducted from the amount of assets charged to the administrator the two hundred dollars paid to the widow for her dower in the land sold, and the sum claimed for the deficiency in the quantity of the land. It is shown by the administration account as settled since the former decree of this court, and which was approved by the circuit court, that after charging the administrator with the personal

assets and the proceeds arising from the sale of the real estate, including the land in controversy, he is in arrear the sum of one thousand six hundred dollars and forty cents. This balance would be nearly if not quite extinguished by the proper charges before referred to. The unsold lands are proved to be of but little value; so that without reference to the other debts alleged to have been outstanding and still unsatisfied, it is manifest that the condition of the estate required a sale of the whole of the lands devised, to satisfy the debts of the testator. The court is therefore of opinion that the circuit court erred in holding that such sale was unnecessary, and in setting the same aside for that cause. And the sale not being impeached in the bill for any other cause, the bill of the plaintiffs should have been dismissed as against the representative of Joseph Meeks.

And the court is further of opinion, as to so much of the bill as seeks an account from the administrator, and the decree in respect to that branch of the case, there is no error in so much thereof as overrules the first and second exceptions of the appellees and the first and third exceptions of the appellant to the report of Master Commissioner Matthews; but the said court erred in overruling the fifth exception of the appellant for the failure to allow the administrator credit for two hundred dollars, the sum paid the widow for her relinquishment of dower in the lands sold. The second and fourth exceptions of the appellant and the third exception of the appellees do not relate to the debits or credits on the administration account, but refer to that branch of the case respecting the indebtedness of the estate and the necessity of a sale of the lands in controversy, and have been before adverted to.

By overruling and sustaining the exceptions applicable to the administration account, the balance of one thousand six hundred dollars and forty cents, ascertained to be due by the report of the master commissioner, and the decree affirming the same, will be reduced by the sum of two hundred dollars, as aforesaid, with interest. For the residue of said sum of one thousand six hundred dollars and forty cents reduced as aforesaid, together with any other sums since received by the administrator, he is responsible.

It is therefore adjudged and ordered that said decree, so far as it conflicts with this opinion and decree, is erroneous, and that the same be reversed with costs to the appellant; and this court proceeding to render such decree as the said circuit court should have done, it is further adjudged and ordered that

the bill of the appellees be dismissed as against the appellant, the representative of said Joseph Meeks, with costs in the chancery court.

And the cause is retained as against the said William P. Thompson, the administrator, and remanded with instructions to recommit the same to the commissioner to reform and settle the account according to the principles of this decree, and with instructions to said court to give notice by proper publication to creditors, if any, whose claims are still valid and unsatisfied, to appear, assert, and establish their claims within a period to be prescribed by the court, and for a decree against said administrator for any balance ascertained upon the principles of this decree, to be due from him, to be applied to the payment of such debts; or paid over to the appellees as the rights of the parties may require.

CABELL, P., absent.

PURCHASER FROM EXECUTOR OR ADMINISTRATOR is not bound to see to application of the purchase money: *Petrie v. Clark*, 14 Am. Dec. 636.

WADSWORTH v. ALLEN.

[8 GRATTAN, 174.]

WRITTEN ORDER OR LETTER OF CREDIT addressed to W. & W. may be proved to have been intended for W., W. & Co., so as to hold the writer bound to the latter firm, and it may be introduced in evidence.

GUARANTOR MAY SPECIFY IN WRITTEN ORDER which he gives the terms upon which he will be bound.

WHEN GUARANTOR UNDERTAKES TO PAY upon receiving reasonable notice, the latter will be a question for the jury.

FACT THAT PRINCIPAL GAVE HIS NOTE for goods which he purchased on a written order will not discharge his guarantor's liability.

ACTION by J. E. Wadsworth, D. B. Turner, and G. S. Palmer, surviving partners of the firm of Wadsworth, Williams & Co., against C. B. Allen and William Phaup, to recover amount due for goods delivered to Daniel Totty on a written order worded as follows: "Raines' Tavern, October 27, 1840. Messrs. Wadsworth & Williams, Richmond—Gentlemen: Please deliver to Mr. Daniel Totty, or to his order, merchandise to an amount not exceeding in value in the whole five hundred dollars; and on your so doing we hereby hold ourselves accountable to you for the payment of the same, in case Mr. Daniel Totty should not be able to do so or should make default; of which default you are

required to give us reasonable and proper notice. Your obedient servants, Charles B. Allen, William Phaup." After the goods had been delivered, Totty executed his note payable in six months. When the same became due plaintiffs notified defendants, but they failed to respond. During the trial plaintiffs offered to prove that the order addressed to Wadsworth & Williams was intended for Wadsworth, Williams & Co. This the court refused to allow. The order was then offered in evidence, but the court refused to admit it. Judgment was awarded in favor of the defendants, and plaintiffs appealed.

Lyons, for the plaintiffs.

Garland, for the defendants.

By Court, ALLEN, J. It seems to the court here that although the guaranty offered in evidence by the plaintiffs in error was addressed to Wadsworth & Williams, and not to the plaintiffs in error, Wadsworth, Williams & Co., yet it was competent for the plaintiffs in error to prove that at the time the same was so addressed to Wadsworth & Williams they were partners in the firm of Wadsworth, Williams & Co.; and were not engaged in the mercantile business on their own account, or in connection with any other mercantile firm in the city of Richmond; and that said letter of guaranty being presented to the plaintiffs in error, the same was accepted by them, and the goods furnished for the price of which this suit was brought. The court is therefore of opinion that, as the evidence set forth in the first bill of exceptions taken by the plaintiffs in error on the trial of the issue tended to prove the facts aforesaid, the circuit court erred in excluding the same from the jury.

And it further seems to the court, that said circuit court erred in excluding from the jury as evidence the said letter of credit in the second bill of exceptions mentioned, as incompetent to charge the defendants in error. By the terms of the letter of credit the defendants in error waived all right to notice of the acceptance of the guaranty, if they would otherwise have been entitled to require it; a question upon which the court expresses no opinion. By their engagement the defendants in error agreed to hold themselves accountable for the payment of the price of the goods to an amount not exceeding the sum therein mentioned, in case the purchaser should not be able to pay for the same or make default; of which default they required reasonable and proper notice to be given them. It was competent for the defendants in error to specify the conditions upon which

their accountability should depend; and having done so, if those conditions have been complied with, they can not object to the failure of the plaintiffs in error to comply with other terms which the law might have imposed, but a compliance with which the defendants in error have waived.

Whether this was reasonable and proper notice of the default was a question for the jury upon the testimony, upon proper instructions from the court.

Nor did the fact that the purchaser gave his bond for the price of the goods discharge the defendants in error from liability on their guaranty; the question between them and the plaintiffs in error being, not what evidence of the debt the latter may have taken from the purchaser, but whether the price of the goods has been paid at the time stipulated in the contract of sale.

It is therefore considered that said judgment is erroneous, and that it be reversed, with costs to the plaintiffs in error, and that the verdict be set aside, and the cause remanded for a new trial of the issues joined; on which trial the part of the deposition of William B. Isaacs, as set forth in the first bill of exceptions, and the letter of guaranty referred to and set forth in the second bill of exceptions, if again offered in evidence, and not objected to for any other cause than is disclosed by said bills of exceptions, are to be permitted to go in evidence to the jury.

CABELL, P., absent.

RULE AS TO VARYING WRITTEN INSTRUMENT BY PAROL EVIDENCE: See *Pack v. Thomas*, 51 Am. Dec. 135, and note referring to other cases in this series.

DECLARATION MADE BY PARTY TO CONTRACT at the time of making the same is admissible as showing mutual recognition of terms, or as part of the *res gestæ*: *White v. Morton*, 52 Am. Dec. 75.

WHAT IS REASONABLE NOTICE IS QUESTION FOR JURY: *Strawbridge v. Robinson*, 50 Am. Dec. 120.

BRYAN v. STUMP.

[8 GRATTAN, 241.]

WHERE PARTIES OWNED TRACT OF LAND JOINTLY, and afterwards married and made subsequently a deed of partition of the same and held it in severalty afterwards, the partition so made will be binding on the parties, even though no certificate of privy examination of the wives appears in the deed.

WHERE TRUSTEE EXECUTES POWER OF ATTORNEY to a third person with authority to release the deed, and the latter does so by and in the name of the trustee, and the land is released, not to the grantor in the trust deed, but to a purchaser under him, the deed of trust will be treated as duly and regularly released.

WHERE OMISSION OF SEALS OR SCROLLS TO DEED raises a cloud over the title to land, the same should be rectified before a sale is made, under a deed of trust, to secure the purchase money.

APPLICATION for injunction from the circuit court of Hampshire county, by Thomas Bryan, to restrain a sale of land under a deed of trust, executed by him to Isaac Baker to secure a debt which he owed to Jacob Stump for the purchase money of the same. The tract was formerly owned by M. Cresap, and at his death descended to his children, Thomas and Abigail. After marriage of these parties this tract was divided between them by deed of partition, but there was no privy examination of either of the *femes covert*. Subsequently Abigail and her husband conveyed her portion to James M. Cresap; the certificate stated that she had been examined privily, but no seals or scrolls had been affixed to the signatures of the commissioners who examined her. James M. Cresap dying, the land descended to his son Luther, who with his mother conveyed it to James Prather, to secure a debt due to John J. Jacob. The debt being paid, the land was sold to Jacob Stump. Stump sold this land to Bryan, and the latter in turn conveyed the land to Isaac Baker, in trust, to secure the purchase money. James Prather, the trustee, executed a power of attorney to William Donaldson, by which he authorized Donaldson to execute for him and in his name a deed of release to the person legally entitled to receive the same. Donaldson executed a deed, which commenced in the name of Prather, by Donaldson, his attorney in fact, and signed Donaldson, attorney in fact for Prather, releasing and conveying the land to Baker. Bryan failing to pay, the land was offered for sale by Baker, and Bryan obtained an injunction, relying upon the want of the certificates of the deed of partition and the conveyances before mentioned. The injunction was afterwards dissolved, and plaintiff appealed.

Robinson, for the plaintiff.

Patton, for the defendant.

By Court, MONCURE, J. The court is of opinion that the partition made between Thomas Cresap and Mary, his wife, and James Cresap and Abigail, his wife, on the twenty-third day of

September, 1802, as appears by their indenture of that date, followed as it has been ever since by the possession in severalty of the said parties, and those claiming under them, is a valid and binding partition, although no certificate of the privy examination and acknowledgment of the said Mary and Abigail is annexed to the said indenture.

The court is also of opinion that the deed of trust of the twenty-ninth of November, 1834, was duly and regularly released by the deed of the nineteenth of July, 1843.

The court is also of opinion that the certificate of the privy examination and acknowledgment of the said Abigail annexed to the indenture of the twenty-seventh day of April, 1814, substantially and sufficiently conforms to the requisitions of the statute of 1792, in regard to conveyances by husband and wife, except that the said statute requires the certificate of the justices to be returned under their hands and seals, and no seals or scrolls appear to be affixed to the names of the justices in this case, though they state in their certificate that it is given under their hands and seals. The court, without deciding whether the apparent omission of seals or scrolls as aforesaid rendered the title of the appellee Stump to the land sold and conveyed by him to the appellant defective, is yet of opinion that, as the said Abigail survived her husband, who did not die until 1836, and therefore when the injunction awarded in this case was dissolved she was not barred by the statute of limitations from asserting any claim to the said land, such omission of seals or scrolls raised a cloud over the title which, according to the case of *Miller v. Argyle*, 5 Leigh, 460, and other cases therein referred to, ought to be removed before any sale is made under the deed of trust to secure the purchase money; and that the said injunction should have been retained until the said cloud was removed by a release of any claim of the heirs of said Abigail to said land, or by the decision of a court of competent jurisdiction adversely to such claim in a suit to which the said heirs were parties, or by the lapse of fifteen years from the death of her said husband, which would bar the right of entry of her heirs, or by some other effective means. Therefore it is decreed and ordered, that the order of the circuit court dissolving the said injunction be reversed and annulled, with costs to the appellant against the appellee Stump; and that the cause be remanded to the said circuit court to be further proceeded in according to the foregoing opinion.

CABELL, P., absent.

VOLUNTARY AGREEMENT FOR PARTITION OF LANDS ACQUIRED BY DESCENT, WHEN GOOD: *Calhoun v. Hays*, 42 Am. Dec. 275.

EFFECT OF DEED OF PARTITION BY GRANTEE OF TENANT when wife has failed to acknowledge the deed: See *Ryerss v. Wheeler*, 37 Am. Dec. 243, and cases cited in the note thereto.

WHEN DEED MADE BY ATTORNEY WILL BIND PRINCIPAL: See *Hale v. Woods*, 34 Am. Dec. 176; *Garrison v. Combs*, 22 Id. 120; note to *Mussey v. Scott*, 54 Id. 719.

BROOKE v. WASHINGTON.

[8 GRATTAN, 248.]

DORMANT PARTNER TO WHOM VENDOR GIVES NO CREDIT, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm.

APPEAL from the circuit court of Jefferson county, taken by Brooke, defendant, in an action entitled *Washington v. Perdue, Nichols & Co.* The opinion states the facts.

Patton, for the appellant.

Cooke, for the appellee.

By Court, MONCURE, J. The suit in which the decree from which the appeal in this case was taken was rendered was a suit brought to recover of dormant partners a debt for which the ostensible partners had given their bonds, but which the latter became unable to pay, by reason of their insolvency. The following appear to be the facts of the case so far as it is material to state them. In 1841, Perdue, Nichols, Brooke, and Jewell entered into partnership for carrying on the iron-making business in the county of Jefferson; and accordingly carried it on for about two years. Perdue and Nichols resided in the county of Jefferson, and were the ostensible partners; Brooke and Jewell were non-residents of the state, and their names did not appear in the style of the firm, which was "Perdue, Nichols & Co." It does not appear to have been known to the appellee, nor generally, that Brooke and Jewell were partners; and it was proved that several suits were brought by different attorneys against Perdue and Nichols alone, as constituting the firm of Perdue, Nichols & Co., though it does not appear that there was any designed concealment of the fact that Brooke and Jewell were members of the firm. In May, 1841, the appellee, Washington, sold and conveyed to Perdue and

Nichols eight hundred and forty-three acres of land in Jefferson for six thousand two hundred dollars; of which one thousand one hundred dollars was paid at the time; and for the balance they gave their bonds, payable in five annual installments, and gave a deed of trust on the land to secure the payment of the same. The cash payment was made by the check of Perdue, Nichols & Co., and entries were made on their books, bearing the same date with the deeds and bonds, to wit, the first of May, 1841, crediting Washington in account with the firm for six thousand two hundred dollars, the purchase money of the land, and debiting him in the same account with one thousand one hundred dollars, the cash payment. During the operations of the partnership for some eighteen months after the purchase, about five thousand cords of wood were cut from the land and used in the said operations. Portions of the land were also rented out and the rents were received by the firm and entered on their books. Brooke had access to the books and looked into them, though it did not appear that he ever examined any account but his own. In December, 1842, Perdue and Nichols, in their individual names and by the partnership name of Perdue, Nichols & Co., executed a deed of trust to secure the debts of the firm which are enumerated. Three parcels of land, besides other property, were embraced in the deed, but the land bought of Washington was not included, and the debt due to him was not mentioned in the deed. In March, 1843, Washington filed his bill, charging that a large portion of the value of the land consisted in the timber and trees standing on it; that the object of the purchasers in buying it was to cut off the timber for fuel to supply their iron-works; that they had cut down and carried off the timber and trees on the land until it was of very little value; that he had no other security for the purchase money than the land itself, under the deed of trust; that the partnership had become insolvent and made a general assignment of their effects for the benefit of their creditors; and his only mode of redress to recover the balance due him was to charge the same on the individual partners; and that Brooke was a partner at the time of the sale, though he was then ignorant of the fact; the name of Brooke being withheld from the public; and seeking to charge said Brooke as a member of the firm for the balance of said debt. Afterwards an amended bill was filed, charging that Jewell also was a secret partner of the firm; and seeking to make him liable. Of all the defendants, Brooke alone filed an answer. He placed his defense upon the ground that the pur-

chase was not made on account or upon the credit of the firm, or by his authority, and was not within the scope of the partnership; and in the absence of any knowledge on the subject at the time it was made, "presumes it was by Perdue and Nichols, with the view of bringing it into the firm as a part of their share of the capital;" and he also objected to the jurisdiction of the court.

The circuit court being of opinion that Brooke and Jewell were secret members of the firm; that that fact was unknown to the appellee at the time of the sale; that the land was purchased for partnership purposes; that the chief value thereof consisted in its timber required as fuel for the iron-works; and therefore that such purchase was a transaction in the ordinary course of business in conducting the iron works—rendered a decree against all the parties for the balance due to Washington, after crediting the proceeds of the sale of the land. From that decree the appeal in this case was taken.

The case of *Weaver v. Tapscott*, 9 Leigh, 424, seems to rule this case, and to show that there is no error in the decree of the circuit court. In that case Weaver and Trimble were partners in the boating business upon James river, between Rockbridge and Richmond. Trimble went to Buckingham and hired hands to be employed in the business, which were actually so employed during a portion of the time that the partnership continued; and for the hire he executed his bond with Tapscott as surety. Trimble, the principal obligor, having become embarrassed, and left the state, Tapscott, the surety, was compelled to pay the money, and filed his bill to recover it of the other partner, Weaver, who had not signed the bonds. He obtained a decree; and this court, consisting of five judges, unanimously affirmed it. Many expressions used by the judges in that case are very apposite to this. Parker, J., says: "A dormant partner to whom a vendor gives no credit, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm: *Robinson v. Wilkinson*, 3 Price, 538; *Saville v. Robertson*, 4 T. R. 720. There can be no doubt that the hiring of hands to be employed in the boating business had immediate reference to the nature of the dealings between Trimble and Weaver. The trade in which they were engaged could not be carried on without hands any more than without boats." "If Tapscott was ignorant of Weaver's being a partner, it brings

this case within the influence of those upon secret partnership: Gow on Part. 176. If he knew it, but dealt with Trimble alone, without intending to release the partnership, it must be governed by the cases of *Bond v. Gibson*, 1 Camp. 185, and *Gouthwaite v. Duckworth*, 12 East, 421. It is only, I think, in cases where a separate credit is clearly given to one of the partners, to the exclusion of the rest, that the latter are absolved." "When one deals with a partner in matters relating to the partnership business, it ought to be inferred that he deals on the credit of the partnership, unless the circumstances prove that, though apprised of the partnership, he meant to give individual credit. It would be hard to hold him bound to prove that he knew of the partnership and dealt on its credit." "The presumption is in the affirmative; and to discharge the firm it ought to appear clearly that he gave credit to the individual alone, and intended to absolve the other partners." Cabell, J., says: "It is perfectly clear that Weaver was equally liable with Trimble, even if Tapscott, at the time of the contract, was ignorant of the fact that Weaver was a partner. And if the fact of the partnership was known to Tapscott, Weaver is *a fortiori* liable; unless indeed it can be shown that Tapscott, with this knowledge, contracted on the individual credit of Trimble, in exclusion of that of Weaver. Nothing of the kind is attempted to be proved, and it can not be presumed without proof. Weaver therefore was clearly liable on the hiring; and the cases of *Salé v. Dishman*, 3 Leigh, 548, and *McCullough v. Sommerville*, 8 Id. 415, show that this objection was not extinguished by the execution of a bond by his partner." Tucker, P., referring to the arrangement alleged, that Weaver should find the hands and Trimble the boats, says that even if it was made between the parties, yet the public had nothing to do with that arrangement, and as Weaver was to get half the profits, he was responsible for the hires, since that interest in the profits *ipso facto* constituted him a partner." Again he says: "'It is possible,' says Chief Baron Macdonald, in *Barton v. Hanson*, 2 Camp. 97, 'that separate credit may be given to one of two partners individually, but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence. And this is reasonable; for why should the partner desire to bind himself and absolve the concern? Or why should the dealer with him prefer to bind him individually, when, if bound as a partner, he is personally not less bound, and there is the additional security of his partner?' In this case it is absurd to suppose that Tap-

scott took Trimble's individual responsibility, if he knew of Weaver's connection with him; and if he did not know of it, then the execution of a sealed instrument could not have been with a view to indicate his individual responsibility in contradistinction to that of the concern."

These copious extracts are made from the opinions of the judges in *Weaver v. Tapscott*, because, *nomine mutato*, they are as applicable to this case as they were to that, and because they leave little or nothing more to be said in this case. It seems to be difficult to find a distinction between that case and this, unless it be in the fact that in that case the bonds were given for negro hire, and in this they were given for the purchase money of land; and that is a distinction without a difference, at least in principle. Land is not ordinarily a subject of partnership operation, and therefore stronger evidence is required to show an intent to convert real estate into partnership stock. But it is capable of being so converted; and an intention to make such conversion being shown by sufficient evidence, it becomes as completely a part of the social effects as if it were personal estate. In the case of *Wheatley v. Calhoun*, 12 Leigh, 264 [37 Am. Dec. 654], this court said, that "whatever doubts may have heretofore existed as to the light in which real property is to be considered, when bought and used by a commercial partnership for the purposes of the concern, it is now well settled that it is to be looked upon as forming a part of the partnership funds. Such is at present the received doctrine in England, and so this court has decided." In that case Wheatley and Calhoun had purchased a mill and tract of land jointly, and for some time conducted a partnership milling business. The question was whether there was sufficient evidence of an intention to convert the mill and land into partnership stock, or whether they merely intended to carry on the milling business in partnership. Tucker, P., in delivering the opinion of the court, said: "There may, indeed, be partnerships in the business of milling, or mining, or farming; but unless the intent of the joint owners to throw their real estate into the fund as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds, for partnership purposes, it must still retain its character of realty." "In this case I see nothing from whence to infer that there was any design on the part of these joint purchasers to convert their real estate into partnership stock."

In the case now under consideration, the evidence is conclusive that the land was bought for partnership purposes, paid

for in part, and intended by the purchasers to be paid for entirely, out of partnership funds, and applied to partnership purposes. The purchase was within the scope of the partnership, for the operations of the furnace could not be carried on without fuel; and the best mode of obtaining it was to purchase land in the neighborhood well covered with wood, as was the land of Washington. All the partners are therefore bound for the purchase money on the authority of the cases before cited. The case of *Pitts v. Waugh*, 4 Mass. 424, was a very different case from this. It was a case of speculation in lands, and the question was whether, not being a subject of trade and commerce, the mercantile law in regard to dormant partners was applicable thereto; and the court thought not. That case was decided in 1808, since which time the partnership law in regard to real estate has undergone great changes: Coll. on Part., sec. 135, and notes. But in this case the land was not purchased for speculation, but for the purpose of carrying on a business which was an ordinary and legitimate subject of commercial partnership. There is nothing in the objection of the statute of frauds. The purchase being within the scope of the partnership, the partners who made it were agents for the partnership which became bound by a valid contract made by their agents. It would also be bound on the doctrine of part performance.

The jurisdiction of a court of equity in this case is fully sustained by the cases of *Sale v. Dishman*, 3 Leigh, 548; *Weaver v. Tapscott*, 9 Id. 424; *Williams v. Donaghe*, 1 Rand. 300; *Galt v. Calland*, 7 Leigh, 594; *Parker v. Cousins*, 2 Gratt. 372 [44 Am. Dec. 388].

The court is therefore of opinion to affirm the decree.

Decree affirmed.

CABELL, P., absent.

DORMANT PARTNERS, WHO ARE—THEIR POWERS AND LIABILITIES.—Dormant partners are those whose names and transactions as partners are professedly concealed from the world: 2 Bouv. Dict. 283, title Partner. A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word: *Nat. Bank of Salem v. Thomas*, 47 N. Y. 19. Term "dormant partner" implies one who is not an active partner, nor generally known as a partner. But to be such it is not essential a person should wholly abstain from any actual participation in the business of the firm, or be universally unknown as bearing a connection with it: *North v. Bloss*, 30 Id. 374. A dormant partner, in the legal acceptation of the term, is one who participates in the profits of the trade, but conceals his name: *Speake v. Prewitt*, 6 Tex.

258. Every partner is considered dormant unless his name is mentioned in the firm or embraced under general terms, as the name of one of the firm and company: *Mitchell v. Dall*, 2 Harr. & G. 171.

POWERS OF DORMANT PARTNERS.—Dormant partners have same powers as other partners. The doctrine of the common law as to the general right and authority of each partner to bind the firm, and act for the firm in all partnership transactions, equally applies to all cases of partnership in trade, whether the partners be all known or some be secret or dormant partners: Story on Part., 7th ed., sec. 103. This rule doubtless had its foundation in common convenience and public policy in regard to all commercial operations, if, indeed, in a general view, it might not be deemed almost a matter of moral necessity in the enlarged intercourse and trade of modern nations. If it were not admitted, then, it would be necessary that every partner should expressly agree to or confirm every transaction affecting the partnership before it could acquire any absolute obligation, or be conclusive upon the partnership. The absence or illness or remote residence of a single partner might greatly delay and retard, if it would not prostrate, the best concerted enterprise or bargain; and before any negotiation could be completed, it would be indispensable that the other contracting party should first, by inquiry, ascertain who all the partners were in any particular firm, and whether they had all deliberately assented thereto. The arrangements of commerce, which are now accomplished in a single hour or day, might thus require whole weeks, or even months, before they could be matured or established: Wats. on Part., 2d ed., 166; Gow on Part., 3d ed., 36; Coll. on Part. 128; Story on Part., sec. 103. To avoid this difficulty, the common law has adopted a very satisfactory and facile rule. It decides that, in the absence of any known controlling stipulation between the parties, each partner shall be deemed invested, by the consent of all of them, with an equal and complete power of administration of the whole partnership property, funds, and affairs. It gives to all and each of the partners what the Roman law allows to be delegated to one by a special authority, the entire administration of all the partnership business, and thereby, as such administrator, he may act for the whole and in the name of the whole: Domat, 14, 1, 4, 1; Civil Code of France, act 1836.

DORMANT PARTNERS, LIABILITIES OF, FOR ACTS AND CONTRACTS OF OSTENSIBLE PARTNERS.—Dormant partners are bound by the written unsealed contracts of the ostensible partners as much as by their parol contracts; but not, for technical reasons, by their sealed contracts: *Beckham v. Drake*, 9 Mee. & W. 79; *Swan v. Steele*, 7 East, 210; *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *United States Bank v. Binney*, 5 Mason, 176; *Tournade v. Hagedorn*, 5 Thomp. & C. 288; *Gilmore v. Merritt*, 62 Ind. 525; Coll. on Part., 6th ed., 14. In Lindley on Part. 237, the author thought that the doctrine that each partner has authority to transact the partnership business in the ordinary way is subject to an exception in the case of dormant or secret partners who have in fact no authority to act for the firm, and who take upon themselves to do so, and the learned author, in support of this view, refers to the judgments rendered by Chief Justice Cockburn in *Nicholson v. Ricketts*, 2 El. & El. 524; and by Cleasby, B., in *Holme v. Hammond*, L. R., 7 Ex., 233. An excellent illustration of the doctrine of the liability of dormant partners is furnished in the opinion rendered by Chief Justice Marshall in the case of *Winthrop et al. v. United States Bank*, 5 Pet. 529. The general rule of the liability of dormant partners, and the application of it, is treated at length. After alluding to the powers of partners, the learned judge said that "their responsibility in all partnership

transactions is admitted to be the same. Those who trade with a firm on the credit of individuals whom they believe to be members of it take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners who were not ostensible are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea that if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles. It has been supposed that the principles laid down in the third instruction, respecting these secret restrictions, are inconsistent with the opinion declared in the first; that in this case, where the articles were before the court, the question whether this was in its origin a secret or an avowed partnership had become unimportant. If this inconsistency really existed, it would not affect the law of the case, unless the judge had laid down principles in the instruction which might affect the party injuriously. * * * The meaning of the term 'secret partnership,' or the question whether this did or did not come within the definition of a secret partnership, might be unimportant; and yet the question whether a private agreement between the partners limiting their responsibility was known to a person trusting the firm might be very important." See also *Wilkins v. Pearce*, 5 Denio, 541; *Sage v. Sherman*, 2 N. Y. 417; *Swan v. Steele*, 7 East, 210; *Hope v. Cust*, 1 Id. 53; *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *United States Bank v. Binney*, 5 Mason, 176; *South Carolina Bank v. Case*, 8 Barn. & Cress. 427; *Livingston v. Roosevelt*, 4 Am. Dec. 273; *Fisher v. Tayler*, 2 Hare, 218; *Hooper v. Lusby*, 4 Camp. 66; *Le Roy v. Johnson*, 2 Pet. 186; *Ex parte Agace*, 2 Cox, 312, and cases cited in Wats. on Part. 166; Gow on Part. 36; Story on Part., sec. 102.

DORMANT PARTNERS ARE EQUALLY LIABLE WITH OTHER PARTNERS upon contracts made during the time they participate in the profits of the business: *Etheridge v. Binney*, 9 Pick. 272; *Manufacturers' Bank v. Winship*, 16 Am. Dec. 30; *Bond v. Gibson*, 1 Camp. 185; *Coope v. Eyre*, 1 Bl. 37; *Lloyd v. Ashbrook*, 2 Taunt. 324; *Green v. Smith*, 2 Bl. 998. The principle upon which dormant partners are liable is, that as they have the benefit of the share in the profits, which are a part of the fund to which a creditor looks for payment, they shall be bound by the burdens. Another reason given for holding them liable is that they might otherwise receive usurious interest without any risk: *Waugh v. Carver*, 2 Id. 235; *Ex parte Hamper*, 17 Ves. 403; *Ex parte Langdale*, 18 Id. 300; *Ex parte Watson*, 19 Id. 459; *Myers v. Sharpe*, 5 Taunt. 74; *Cheap v. Craymond*, 4 Barn. & Ald. 663; *Smith v. Watson*, 2 Barn. & Cress. 491; *Reid v. Hollingshead*, 4 Id. 867; *Ex parte Chuck*, 8 Bing. 468; *Green v. Beesley*, 2 Bing. N. C. 108; *Ex parte Digby*, 1 Deac. 341; *Pott v. Eyton*, 3 Mann. 33; *Byers v. Doby*, 1 Bl. 236; *Hesketh v. Blanshard*, 4 East, 144; *Wilkinson v. Frazier*, 4 Esp. 182; *Muzzy v. Whitney*, 10 Johns. 226; *Dob v. Halsey*, 8 Am. Dec. 293; *Champion v. Bostwick*, 31 Id. 376; *Vandenburgh v. Hull*, 20 Wend. 70; *Burckle v. Eckhart*, 3 N. Y. 142.

DORMANT PARTNER'S LIABILITY, UNDER LAW MERCHANT, IN PURCHASE OF REAL ESTATE.—The law merchant, in reference to dormant partners, has been held to be confined to trade and commerce, and not to extend to speculations in the purchase and sale of lands. In *Pitts v. Waugh*, 4 Mass. 424, Parsons, J., held that by the law merchant a man may be answerable as a dormant partner on a contract made by the partnership of which he is a

member. But this law is confined to trade and commerce, and does not extend to speculations in the purchase and sales of lands. When lands are sold, no man, as a dormant partner, can claim any part of the lands by virtue of any conveyance to which he is not, on the face of it, a party. If the nominal purchaser choose to hold the lands, the party who advanced the money, if not named as a grantee, can have no title to the land, whatever remedy he may have against him to whom the land was conveyed; he can not, therefore, be holden to the vendor for the payment of any part of the consideration, unless he has agreed to be liable. See also cases cited in note to 3 Kent's Com. 31; *Smith v. Burnham*, 3 Sumn. 435. It has, however, been frequently held that there may be a partnership in the business of purchasing and selling real estate: *Dudly v. Littlefield*, 21 Me. 418; *Kramer v. Arthurs*, 7 Pa. St. 165; *Fall River Whaling Co. v. Borden*, 10 Cush. 468; *Ludlow v. Cooper*, 4 Ohio St. 1; Story on Part., secs. 82, 83, and cases cited in the notes thereto.

DORMANT PARTNER IS NOT LIABLE WHEN CREDIT IS GIVEN TO ONE PARTNER ONLY.—In the case of a dormant and secret partner, credit, if given to one partner, is given only to the ostensible partner, for no other partner is known. Still, however, it is not treated as an exclusive credit, for the law in all cases of this sort founds its decision upon the ground that the creditor has had a choice or election of his debtor, which can not be when the partner is dormant and unknown: 3 Kent's Com. 32; *Winship v. Bank of United States*, 5 Pet. 529; *Etheridge v. Binney*, 9 Pick. 272; Story on Part., sec. 63; *Phillips v. Nash*, 47 Ga. 218; *McCreary v. Van Hook*, 35 Tex. 631; *Bradshaw v. Apperson*, 36 Id. 133; *Hill v. Voorhies*, 22 Pa. St. 68; *Ontario Bank v. Hennessy*, 48 N. Y. 545; *Mason v. Patridge*, 66 Id. 663; *Strader v. White*, 2 Neb. 348; *Griffith v. Buffum*, 54 Am. Dec. 54.

LIABILITY OF DORMANT PARTNER CEASES UPON RETIRING FROM FIRM.—A dormant partner is not liable for any debts or other contracts of the firm, except for those which are contracted during the period that he remains a dormant partner. Upon his retirement his liability ceases. The reason is, that no credit is, in fact, in any such case given to the dormant partner. His liability is created by operation of law, independent of his intention, from his mere participation in the profits of the business; and therefore it ceases by operation of law as soon as such participation in the profit ceases, whether notice of his retirement be given or not: Coll. on Part. 371; Gow on Part. 251; 3 Kent's Com. 68. It was held in *Ayrault v. Chamberlin*, 26 Barb. 89, that a dormant partner coming in and taking an interest in an undertaking already in progress, where the parties were already standing in fixed and definite legal relations towards each other, and going out and disposing of his interest before such undertaking is entirely completed, would not be liable for a default occurring after thus going out. No notice of a dissolution is necessary, in the case of a dormant partner, to protect him from demands originating after the dissolution. See also *Platt v. Halen*, 23 Wend. 456; *Chamberlin v. Dow*, 10 Mich. 319.

DORMANT PARTNER, NECESSITY OF GIVING NOTICE UPON RETIRING FROM FIRM.—If the fact of a party being known as a dormant partner be known to a few creditors of the firm, notice to those few is necessary, because they may be fairly presumed to have given credit to the firm with reference to their knowledge of the dormant partner. An instance of what the general rule seems to be upon this point is found in *Nussbaumer v. Becker*, 87 Ill. 281. It was held in that case that the duty of a retiring dormant partner to give

notice of the dissolution of the partnership is a duty which he owes to those who, before that time, had some knowledge of his connection with the firm. To strangers having no such knowledge, he owes no such duty. As to them he can only be charged as a partner, when in fact he was not, by showing that he in some way misled them, as that he held himself out to the world as such, or that he so held himself out to them: *Grosvenor v. Lloyd*, 1 Met. 19; *Edwards v. McFall*, 5 La. Ann. 167; *Creglee v. Durham*, 9 Ind. 375; *Park v. Wooten*, 35 Ala. 242; *Holtgrove v. Wintker*, 85 Ill. 470; *Hicks v. Russell*, 72 Id. 230; *Southern v. Grim*, 67 Id. 106; *Whitesides v. Lee*, 1 Scam. 548.

DORMANT PARTNER, WHEN NECESSARY PARTY TO SUIT, AS PLAINTIFF OR DEFENDANT.—It seems exceedingly difficult to reconcile the cases which endeavor to lay down a rule as to the joinder of dormant partners with active partners in a suit at law. The general rule seems to be that all the partners should join: *Gow on Part.* 127; *Story on Part.*, sec. 241. In Iowa, Ohio, Nebraska, and Missouri the statute provides that the partners may be sued jointly or separately at the option of the plaintiff: *Gates v. Watson*, 54 Mo. 585; *Putnam v. Ross*, 55 Id. 116; *Whitman v. Keith*, 18 Ohio St. 134; *Allen v. Maddox*, 40 Iowa, 124; *Burlington & Missouri River R. R. Co. v. Dick*, 7 Neb. 242. Partners can not at common law sue or be sued by their partnership name, but the names of the individuals must be stated: *Pollock v. Dunning*, 54 Ind. 115; *Blackwell v. Reid*, 41 Miss. 102; *Proprietors of Mexican Mill v. Yellow Jacket Mining Co.*, 4 Nev. 40; *Palin v. Small*, 63 N. C. 484; *Smith v. Walker*, 6 S. C. 169; *Kamm v. Harker*, 3 Or. 208; *Barber v. Smith*, 41 Mich. 138; *Moore v. Burns*, 60 Ala. 269. There are a number of cases which hold that a dormant partner need not join as plaintiff: *Waite v. Dodge*, 34 Vt. 181; *Wood v. O'Kelly*, 8 Cush. 406; *Rogers v. Kichlin*, 36 Pa. St. 293; *Garratt v. Miller*, 37 Tex. 589; and the following cases hold that he need not be joined as defendant: *Chase v. Deming*, 42 N. H. 274; *Brown v. Birdsall*, 29 Barb. 549; *North v. Bloss*, 30 N. Y. 374; *Hopkins v. Kent*, 17 Md. 72; *Carey v. Bright*, 58 Pa. St. 70; *Wright v. Herrick*, 125 Mass. 154.

TRICE v. COCKRAN.

[8 GRATTAN, 442.]

TRESPASS ON CASE IS PROPER REMEDY FOR FRAUDULENT REPRESENTATIONS respecting the soundness of a slave or other personal chattel sold. *Assumpsit* is a concurrent remedy, and the party deceived may elect which method he will proceed under.

IT IS NOT NECESSARY TO ALLEGE DEFENDANT'S KNOWLEDGE of the unsoundness of a chattel at the time of sale in an action brought for breach of warranty, nor is it necessary to prove the allegation.

ACTION by B. F. Cockran against G. W. Trice for five hundred dollars damages for loss incurred by the death of a slave purchased from Trice. The first count alleged the purchase of the slave and the inducements which Trice made "by then and there falsely and fraudulently warranting the said slave to be sound." The second count charged that the defendant Trice

was possessed of the slave, and had personal knowledge of the unsoundness. Evidence was offered upon the trial showing that the slave was diseased at the time of the sale, and defendant's bill of sale duly sealed containing the warranty of soundness was also introduced. The court held that the plaintiff was not entitled to recover by the force of the warranty merely. The defendant recovered judgment, and an appeal was taken to the circuit court. The latter court sent the case back, reversing the ruling of the judge, and Trice obtained a *supersedeas* to this court.

Lyons, for the plaintiff.

R. T. Daniel, for the defendant.

By Court, BALDWIN, J. In this case the instruction given at the trial, on the motion of the defendant, was not in reference to the form of the action or the form of the evidence of warranty. The defendant did not assert or concede that there was a warranty by deed, or any warranty at all. On the contrary, his own evidence presented the question, whether the bill of sale for the slave, executed by the defendant, before the sale, and in blank as to the name of the vendee and other particulars, and left with his agent in that condition, to be filled up by the latter after a sale should be made by him for the defendant, and so filled up by the agent, without any authority from the defendant by deed, or any other authority than as above mentioned, was in point of law the deed of the defendant. And also the further question, whether the verbal authority to the agent to fill up the blanks in the bill of sale still existed at the time therein mentioned, or had been exhausted by a prior sale by the agent to the plaintiff, which was rescinded by agreement between them, without consultation with the defendant. And if the bill of sale was not upon either ground the deed of the defendant, or whether it was so or not, still an ulterior question was presented by the evidence, whether the plaintiff could avail himself of a parol warranty of soundness made by the agent at his last sale aforesaid.

The instruction given for the defendant was not upon any of those points. The court was not called upon to say to the jury that if they believed the evidence the verbal authority from the defendant to his agent to fill up the blanks in the bill of sale was sufficient in law, or that it was not exhausted by the first sale made by the agent, or that the bill of sale was the deed of the defendant, or that covenant and not case was the plaintiff's

only remedy, unless there was actual fraud in the sale of the slave, or that the plaintiff could not recover upon the parol warranty made by the agent. But the broad instruction given to the jury was in effect that whether the warranty was by deed or by parol, the plaintiff could not recover upon either count of his declaration, without proving moreover, not only that the slave was unsound at the time of the sale, but that the defendant knew of the unsoundness, and fraudulently concealed it, or falsely and fraudulently represented the slave to be sound. This instruction was clearly wrong, in regard to the first count of the declaration, which was not founded upon actual fraud, but upon a mere warranty only.

The action of trespass on the case is a proper remedy for the breach of an express warranty of soundness of a slave, or other personal chattel sold, as much so as the action of *assumpsit*, with which it is a concurrent remedy, and the party aggrieved may elect between them. In both forms of action the *gravamen* is the breach of the warranty, which in the former is treated as a tort, with the appropriate language in declaring for a tort, but a *scienter* or knowledge of the defendant of unsoundness is immaterial and need not be alleged in the declaration, nor, if alleged, need it be proved. This is the firmly established doctrine of the courts, both in England and in this country, ever since its adjudication in *Williamson v. Allison*, 2 East, 446. It seems, however, that the directly opposite proposition was asserted by the defendant, and that it was contended on his part at the trial that in case upon an express warranty actual fraud is the gist of the action and must be established, though a breach of the warranty be proved.

It is true that upon the second count of the declaration actual fraud, which involved the *scienter* of the defendant, was essential to the plaintiff's recovery; that count not being founded upon the warranty, but upon a fraudulent concealment or misrepresentation of unsoundness; but in the first count a *scienter* of the unsoundness is not even alleged, and the substantial grievance complained of is, that the plaintiff was deceived and injured by the falseness or wrongfulness of the warranty itself. Upon the second count the plaintiff was entitled to recover on proof of actual fraud, whether the warranty was by deed or by parol; and upon the first count the defendant seems to have silently waived the question whether the warranty was by deed or by parol. This it was competent for him to do; and if a verdict had been rendered for the plaintiff on that count, and a new

trial asked for, it could not have been properly granted on the ground that the warranty was by deed.

This court can not undertake to say that the instruction given for the defendant was correct because the warranty was not by parol, but by deed. The bill of exceptions can not be treated as a demurrer to evidence, and a point raised which was not asserted in the motion for instructions to the jury. There was evidence before the jury tending to prove a warranty by parol as well as by deed, and it would be improper to infer the correctness of the broad proposition, as applicable to the sale, that actual fraud was necessary to maintain the action, by inference from a narrower proposition, not asserted, that the warranty was by deed and not by parol, and therefore that in the absence of actual fraud the proper remedy was in covenant, and not in case. A party moving an instruction ought to lay his finger upon the very point, and not leave the correctness of his proposition upon the silent assumption of another proposition unasserted though presented by the evidence. Such a practice might tend to surprise the court and mislead the jury. In this case the jury might have inferred, and most probably did infer, from the instruction given, that the only question for their consideration was whether actual fraud was proved by the evidence.

It seems therefore to the court that the instruction given to the jury by the hustings court was erroneous, and that its judgment was therefore correctly reversed by the circuit court.

But it further seems to the court that the circuit court erred in its direction that upon the new trial to be had, the instruction moved by the plaintiff and rejected by the hustings court should be given to the jury, which direction must be treated as part of the judgment of the circuit court.

The instruction so directed in effect assumes that whether the warranty was by deed or by parol, the plaintiff is entitled to recover without proof of actual fraud on the part of the defendant.

Both judgments reversed with costs, and case remanded for a new trial upon the evidence which may be adduced by the parties; and such proper instructions as the court may thereupon give to the jury.

Judgment reversed.

CABELL, P., absent.

PROPER FORM OF ACTION FOR BREACH OF WARRANTY IN SALES.—A warranty enters into the contract, and the remedy is either in *assumpsit* or

case: *Tyre v. Causey*, 4 Harr. 425; *Kimball v. Cunningham*, 4 Mass. 502; *Everston v. Miles*, 6 Johns. 138; *Cutler v. Cox*, 2 Blackf. 178.

PLAINTIFF IN ACTION FOR BREACH OF WARRANTY IN SALE need not allege fraud: *West v. Emery*, 44 Am. Dec. 356.

CHARLES v. CHARLES.

[8 GRATTAN, 486.]

RIGHT OF HUSBAND TO PROPERTY OF HIS INTENDED WIFE may be relinquished by his agreement to that effect, and where there is an express contract made to that effect, the wife is to all intents a *feme sole* in respect to her property.

HUSBAND HAS NO RIGHT TO ADMINISTER UPON HIS WIFE'S PROPERTY when he has relinquished his right to her property previously to marriage.

APPEAL from the circuit court of York county. The facts are sufficiently stated in the opinion.

Morson, for the plaintiff.

Meredith, for the defendant.

By Court, ALLEN, J. The deed of marriage settlement duly executed by the parties and their trustee before marriage, recited amongst other things that it hath also been agreed that in case the said Charles should after the intended marriage happen to survive the said Martha, that he should not claim any part of the real or personal estate whereof the said Martha should be seised or possessed or entitled to at any time during the coverture between them; and that the said real and personal estate of the said Martha should be in no wise under the control of the said Charles, nor in any manner or at any time subject to his debts. The deed then proceeds to grant the property of the intended wife to the trustee, and by the declaration of trust the separate and exclusive use of the property is secured to the wife; the trustee was to permit her to dispose of it by will or otherwise, and to convey the property to such appointee or alienee; but in the declarations of trust there is no express provision excluding the husband in the event of his surviving, and in default of any appointment or disposition by the wife. And it is contended that by operation of law the husband surviving is entitled, in virtue of his marital rights, to take the property, as she did not dispose of it or appoint the uses to which it should be applied after her death. The rights of the husband to the property of his intended wife may be in-

tercepted by his agreement to that effect; and where by express contract, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture or after the death of the wife. In such case the wife is to all intents to be regarded as a *feme sole* in respect to such property; and there would seem to be no necessity for any limitation over to her next of kin in the event of a failure to appoint during her life-time. The husband having by contract for a good consideration released his rights as survivor, the property must pass as though she had died *sole* and intestate. That such was the intent of the parties in this case is clear from the deed. The contingency of his surviving was foreseen, and the agreement as recited in the deed signed by all the parties provided for it. By that agreement so recited he bound himself not to claim the property should he happen to survive his wife. There is nothing to indicate an intention to restrict the claim as against the appointees of the wife. The expressions refer not to persons against whom he would not claim, but to the subject as to which in that contingency he released all claim; and to show more clearly that such was the intent of the agreement, it is furthermore recited that the property was not to be under his control, or in any manner or at any time subject to his debts, not restricting the time to the continuance of the coverture.

Having thus by contract intercepted the marital rights of the husband either to enjoy during coverture or to take by survivorship; and this intention appearing on the face of the deed, it was only necessary that the declarations of trust should provide for the control and authority of the wife during coverture. And the property, if not disposed of, passed to her personal representative for the benefit of her next of kin, as if no marriage had ever taken place, and she had died *sole* and intestate.

The right of the husband to administer depending on the question whether in virtue of the marital right he is entitled to the property, and as by the agreement recited in the deed of settlement he relinquished and renounced such right, his motion to administer was properly overruled, and the administration granted to the appellee, one of the distributees of the deceased. The order should be affirmed.

CABELL, P., absent.

CONVEYANCE BY WIFE BEFORE MARRIAGE, WHEN BINDING UPON HUSBAND.—Husband apprised, before marriage, of the disposition which his intended wife has made respecting her property, and consummating the marriage contract, can not afterwards complain and ask to have the conveyance set aside: *Cheshire v. Payne*, 16 B. Mon. 618; *Terry v. Hopkins*, 1 Hill Ch. 1; *Cole v. O'Neil*, 3 Md. Ch. 174; *Fletcher v. Ashley*, 6 Gratt. 332. Parol antenuptial agreement between husband and wife, when valid, respecting the disposition made by wife of her property: *Gackenbach v. Brouse*, 39 Am. Dec. 104.

CASES
IN THE
GENERAL COURT
OF
VIRGINIA.

COMMONWEALTH v. PICKERING.

[8 GRATTAN, 628.]

INDICTMENT FOR PERJURY must not only allege the materiality of the evidence given by the accused, but must also show that the court had jurisdiction of the case in which the alleged perjury was committed.

APPEAL from the circuit court of Wirt county. The facts are stated in the opinion.

Baxter, attorney general, for the plaintiff.

Fisher, for the defendant.

By Court, LEIGH, J. The defendant was indicted in the circuit court of Wirt for perjury in giving evidence to the grand jury impaneled in that court. The defendant demurred to the indictment, and upon the argument of the demurrer, the court adjourned eight questions to this court.

The indictment alleges that on the day of, 1850, a grand jury was summoned and impaneled for the county of Wirt, and whilst they were examining and investigating the violations of the laws of the commonwealth committed within the county, the defendant appeared in open court, and at his own instance was sworn by the court that the evidence he should give to the grand jury should be the truth, the whole truth, and nothing but the truth, the court having then and there competent authority to administer the said oath; and that whilst the defendant was being examined by the grand jury it then and there became material to inquire whether Alfred Fought, esq.

(a justice of the peace for the commonwealth of Virginia in and for the county of Wirt), was present and was called upon to suppress a fight between the defendant and one John Hickman; and the defendant being sworn as aforesaid, did then and there, in the said county before the grand jury, falsely, willfully, and corruptly depose, swear, and testify that Alfred Fought, esq. (a commonwealth's justice of the peace for the county aforesaid), was present and was called to suppress a fight between the defendant and John Hickman, and that Fought did then and there refuse to assist in quelling the said fight; whereas the said Alfred Fought was not present at the time and place the said fight took place, and was not called upon to suppress the fight.

We shall first consider the question which submits to us whether the materiality of the defendant's evidence given before the grand jury sufficiently appears in the indictment. The criminal jurisdiction of the circuit court of Wirt was limited to offenses committed in the county; and the court had no authority to swear a witness to give evidence before the grand jury of the said court of an offense committed out of the county. It was therefore necessary to show on the face of the indictment that the offense of which the defendant gave evidence was committed within the county; otherwise it would not appear that the court had jurisdiction of the offense, and the evidence could not be material, as no evidence given in a court having no jurisdiction to determine the case can be material. This indictment does not allege that the offense of which the defendant gave evidence was committed within the county of Wirt. It alleges that this offense was committed at the time and place at which the fight took place, but where the fight took place is nowhere stated. It might possibly have taken place in Wirt, but if the indictment shows on its face only that the evidence might have been material, it is not sufficient: it must show that it was material. For this reason we are of opinion that the materiality of the evidence given by the defendant does not sufficiently appear in the indictment.

There are other objections to this indictment. It does not appear what was the question the grand jury was examining into, or for what purpose the examination was made. We may conjecture that it was made to ascertain whether Fought, either as a justice or individual, had been guilty of a neglect of duty, but whether as magistrate or individual we can not with any certainty say. He is, in the indictment, called a justice of the peace, and it may be that the inquiry was whether he, as a jus-

tice, had been guilty of neglect of duty; but the allegation that he was a justice of the peace is made in such a manner that it does not certainly appear that he was a justice at the time the fight took place. If he was proceeded against as an individual, the indictment is defective for not showing that he had been called on by any person who had authority to call upon him. For this uncertainty as to the question before the jury, the indictment may be bad, but we have not deemed it necessary to examine this question with much care, as the judgment must be entered for the defendant for other defects. One of the judges, however, is decidedly of opinion that the particular inquiry before the jury, and the object of it, ought to have been set out in the indictment in order that the court might see whether or no the evidence of the defendant was material.

In answer to the sixth and eighth questions adjourned, this court is of opinion and doth decide that the materiality of the evidence given by the defendant to the grand jury does not sufficiently appear in the indictment; and that judgment on the demurrer ought to be entered for the defendant. And this court does not deem it necessary to decide any other of the questions adjourned. Which is ordered to be certified to the circuit court.

INDICTMENT FOR PERJURY, WHAT IT MUST ALLEGE: See *Respublica v. Newell*, 2 Am. Dec. 381; *State v. Street*, 3 Id. 682; *Commonwealth v. Knight*, 7 Id. 72; *State v. Mumford*, 17 Id. 573; *United States v. Morgan*, 41 Id. 234, and notes to same citing other cases appearing in this series.

HENDERSON v. COMMONWEALTH.

[8 GRATTAN, 708.]

INDICTMENT WILL LIE FOR MISDEMEANOR, where a trespass *quare clausum fregit* is accompanied by acts constituting a breach of the peace.

GEORGE W. HENDERSON was indicted for misdemeanor, tried and convicted. The facts are about as follows: Henderson owned some sheep which were afterwards killed by dogs. Being convinced that Enos Pugh's dogs did the mischief, he armed himself with a shot-gun and proceeded to Pugh's house in the latter's absence. Mounting the porch he encountered Nancy Pugh, informed her that he suspected the dogs and had come to kill them. She argued that he was wrong in his surmises, demurred to having the dogs killed, and forbade his doing so. He disregarded her, and without removing from his position fired and

killed a dog. He reloaded his gun, and the little dog having concluded to remain by his dead companion, he fired at him but only succeeded in wounding him. The firing greatly alarmed and dismayed Nancy Pugh and her two daughters, one of whom, being a dyspeptic, became sick in consequence. Henderson seized upon a favorable moment for his dog-killing expedition, inasmuch as the male Pughs were all in jail at his instigation. The court ruled that it was immaterial whether the dogs killed the sheep or not, if the trespass was a breach of the peace the indictment was good. Hence the appeal.

By Court, LOMAX, J. It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action; and can not be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling-house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense, and becomes the subject of a criminal prosecution. The cases of *Rex v. Storr*, 3 Burr. 1698, and *Rex v. Bathurst*, which was cited in that case, establish and illustrate both of these principles. Three of the indictments in that case were quashed, because they amounted merely to trespass *vi et armis*. But as to the fourth indictment, which was for entering a dwelling-house *vi et armis*, and with strong hand, the objection to that indictment was given up by the counsel for the defendant, and the prosecution for that offense was sustained, whilst the first three indictments were ordered by the court to be quashed. From what was said in those cases, the circumstance that the place where the entry is made is a dwelling-house, as reason would suggest, and the peace of those abiding under the sanctity of their home and the security of their castle, would strongly require, is a most important circumstance to be taken into consideration in the aggravation of trespass *quere clausum fregit* into a misdemeanor; as is also the circumstance that the entry was made with fire-arms or other offensive or dangerous weapons. The facts as disclosed in this record for the purpose of sustaining the motion for a new trial show a trespass most aggravated in both of these circumstances; as also in the destruction of animals within the personal and domestic protection of the owners of the dwelling-house, and the alarm and

dismay and other evils which the violence occasioned to the unprotected females of the family. No trespass could be aggravated beyond the wrongs of a private injury, and swell into the magnitude of a crime against the public peace, if the facts stated in the record do not amount to a misdemeanor. Therefore the motion for a new trial was properly overruled. It is hardly less clear that the frame of the indictment, in its charges of the circumstances accompanying the trespass, is sufficient to maintain the prosecution. Wherefore the errors in arrest of judgment were also properly overruled. The judgment of the circuit court should be affirmed.

EVERY TRESPASS WHICH IS BREACH OF PEACE IS INDICTABLE OFFENSE: *State v. Wheeler*, 23 Am. Dec. 212. So discharging a gun at wild fowl, with knowledge and warning that the report will injuriously affect the health of a sick person in the neighborhood, such effect being produced by the discharge, is an indictable offense: *Commonwealth v. Wing*, 19 Id. 347; see also *State v. Wilcox*, 24 Id. 569; *State v. Buckman*, 29 Id. 646.

COMMONWEALTH v. WORMLEY.

[8 GRATTAN, 712.]

NEW TRIAL WILL BE ALLOWED TO PERSON CONVICTED OF MURDER when it is shown that the jury, previous to rendering the verdict, were permitted to converse and drink spirituous liquors with persons during the absence of the sheriff.

APPEAL from the circuit court of Chesterfield county. Defendant J. S. Wormley was convicted of the murder of Anthony T. Robion. He moved for a new trial, on the ground that the verdict was not warranted by the evidence, and that there was great misbehavior on the part of the sheriff and the jury—the latter being permitted to converse and drink spirituous liquors with several persons during the absence of the sheriff, and without the permission or authority of the court. The motion was not allowed, and defendant appealed.

Bocock, attorney general, for the plaintiff.

Robert G. Scott, for the defendant.

By Court, FIELD, J. The court is of opinion, in answer to the first and second questions adjourned, that the conduct of the sheriff in withdrawing from the jury at the house of Mr. Cheatham, and leaving them in the parlor in company with three

other gentlemen, as is set forth in the record, was sufficient to vitiate the verdict of the jury; and upon that ground a new trial should be awarded to the prisoner.

The court deems it proper to add, that the conduct of the sheriff in conducting the jury to the house of Mr. Cheatham, and withdrawing from them under the circumstances disclosed by the evidence, was such misbehavior on the part of that officer as to deserve the animadversion and censure of the court. The act should be condemned, because its tendency is to impair the purity of the trial by jury in criminal cases.

LOMAX, J., absent.

JURORS CONVERSING WITH PARTIES WHILE CASE IS UNDER CONSIDERATION BY THEM will be good ground for a new trial: See *Nelms v. State*, 53 Am. Dec. 94, and note, where prior cases appearing in this series are collected.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KELLOGG *v.* LARKIN.

[3 PINNEY, 123; 3 CHANDLER, 133.]

DECLARATION ON CONTRACT IN PARTIAL RESTRAINT OF TRADE need not expressly aver the reason to support the restraint, if it sufficiently appears from the contract itself, which is set forth in the declaration.

DEMURRER ADMITS ONLY FACTS WELL PLEADED.

NO AVERMENT CAN GIVE TO AGREEMENT CHARACTER IT HAD NOT, and no admission can take from it the character it had, where an agreement is laid before the court for construction.

BEFORE COURT SHOULD DETERMINE CONTRACT TO BE VOID AS CONTRAVENING POLICY OF STATE, where the contract is made in good faith, and stipulates for nothing that is *malum in se* or *malum prohibitum*, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.

AGREEMENT IN PARTIAL OR LIMITED RESTRAINT OF TRADE IS VALID when founded upon a sufficient consideration.

CONTRACT IS NOT VOID AS BEING IN RESTRAINT OF TRADE whereby the mill owners of Milwaukee agree to pay to the warehousemen a certain amount per bushel on wheat coming into the Milwaukee market, so far as they are able to control the same, and the warehousemen agree to give the mill owners the full, absolute, and uninterrupted control of the Milwaukee wheat market for a certain time, as far as they are able, by virtue of their capacity as warehousemen, or vessel and dock owners, and not to deal in wheat during that time, or make any contract for storage of wheat during that time, except as agents of the mill owners.

COVENANT for the recovery of rent. The opinion states the facts. Judgment for plaintiffs. The defendants brought error.

N. J. Emmons, for the plaintiffs in error.

J. E. Arnold, *contra*.

By Court, HOWE, J. The plaintiff below, Larkin, declared in covenant for the rents reserved in a lease executed by him to Kellogg & Webb, of one portion of a certain warehouse, situated in the fifth ward of the city of Milwaukee. The lease contained a covenant on the part of the plaintiff by which he obliged himself, during the term for which the premises were demised, to wit, from the seventh of January to the first day of August following, "not to purchase, store, or handle any wheat in the Milwaukee market, except under the direction" of the defendants.

This covenant, as is said, being in partial restraint of trade, is *prima facie* bad, and should be aided by an averment of some special circumstances showing a good reason, independent of a mere pecuniary consideration, to support it. And the want of any such averment, it is further said, is a substantial defect in the declaration which entitles the defendants to judgment upon the demurrer, notwithstanding the insufficiency of their plea.

The only reason ever assigned in support of such restrictions is, that they are necessary or useful to the party with whom the contract is made, as a protection to him in the prosecution of his business. And it is not necessary that such reason should be expressly averred, if it sufficiently appears from the contract itself. Here the lease is set forth at length in the declaration, and that sufficiently discloses the interest which the defendants had in requiring protection against the competition of the plaintiff. And so the interest or reason is usually made to appear: See, for instances, *Mitchel v. Reynolds*, 1 P. Wms. 181; *Mallan v. May*, 11 Mee. & W. 652; *Chappel v. Brockway*, 21 Wend. 157.

I have found no case in which these circumstances or reasons have been expressly averred, although it is suggested that they might be set out by averment when they did not appear upon the face of the contract: *Ross v. Sadgbeer*, 21 Wend. 166.

The declaration is therefore sufficient in substance to support the judgment of the county court. Let us consider if the plea demurred to discloses a good answer to that declaration.

This plea, in its character, is quite original. I think it would be difficult to say what precedent gave form to it. But in its structure it is ingenious; I think it would be quite as difficult to say what canon of good pleading was violated by it. But I have to consider, not its form, but its body in substance.

Its material averments, I think, may be stated as follows:

1. That the lease declared upon "was made, entered into,

and executed for the further countenancing and proceeding in the undertakings, schemes, and plans of the produce association," of which the parties to the lease were severally members.

2. That the produce association was composed of the proprietors of certain warehouses, to the number of eleven, and the owners of certain mills in the city of Milwaukee.

3. That the produce association, on the twenty-ninth day of December, 1849, entered into an agreement by which the mill owners were parties of the first part, and the warehousemen were parties of the second part, the prominent features of which agreement were as follows: 1. The mill owners agree to pay the warehousemen "four cents per bushel commission, or storage, on each and every bushel of wheat coming to the Milwaukee market to be disposed of, by sale in the street or by storage (so far as they are able to control the same)," from that date to the first day of August then next; 2. The warehousemen, in consideration thereof, agree "to give to the parties of the first part full, absolute, and uninterrupted control of the Milwaukee wheat market, from the date hereof up to the first day of August, A. D. 1850, so far as they shall be able to do so by virtue of their capacity as warehousemen or vessel and dock owners; that they will not themselves, or through the agency of others, directly or indirectly, under any name or pretense whatsoever, purchase, contract, or bargain for any wheat in the Milwaukee market, from the date hereof up to the first day of August, A. D. 1850, nor make any contracts for the storage of wheat during the time aforesaid, except as agents under the direction and control of the parties of the first part;" 3. That nothing herein contained is to give the said parties of the first part any right to close the warehouses against the storage of wheat, or to fix a higher rate of storage than four cents per bushel; 4. That "the parties of the second part shall at all times hold themselves in readiness to purchase, store, and deliver or ship wheat for account of the parties of the first part, at the rate of four cents per bushel as aforesaid;" and, 5. That the mill owners shall pay to the warehousemen four cents per bushel upon all wheat received into the mills for shipment or grinding, "grist work excepted."

4. It is averred that the objects and purposes of the association were to carry out and perform these agreed plans and schemes.

5. It is averred that the association, its general plans, schemes, attempts, and undertakings, tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce

the price of the commodity of wheat, and to stifle fair and lawful rivalry and competition of dealers therein.

Upon this last averment a point was raised upon the argument, which, as it seems preliminary to the main question, I will here dispose of.

It was said that because it is expressly averred that the "association, its agreed plans, schemes," etc., "tended to the manifest injury and restraint of trade," etc., and because the truth of this averment is admitted by the demurrer, and because whatever contracts do have such tendency, are held to be void as contravening public policy, therefore the judgment of the county court should have been for the defendants.

The answer to this objection is manifest. Undoubtedly a demurrer admits the verity of every fact well pleaded; but I have to say, that if the "agreed plans and schemes" which are alleged to have such pernicious tendency are any other than those that are developed in the articles of the twenty-ninth of December, 1849, then they are not well pleaded, and for these two reasons: 1. Because (as I think) they should be set forth in terms: not by describing their symptoms or effects, but stating their essence and nature, leaving the court to judge of their tendencies and probable effects; and, 2. Because, in such case, this averment would be clearly repugnant to that other averment, to wit, that the "objects and purposes of which association were to carry out and perform all the acts, plans, and schemes contemplated and agreed upon in the said article of agreement."

But doubtless the pleader referred to the articles themselves, which he sets forth *in extenso*, as developing the plans and schemes alleged to be so injurious to the public interests. The agreement is therefore laid before the court for construction—to have its character and tendencies determined by judicial interpretation—not proved to the satisfaction of a jury.

Whether such an agreement existed, whether the lease sued upon grew out of it, or was connected therewith so as to be tainted by it, if taint was in it, were questions which, if raised, must be settled by a jury. But what the agreement essentially was, and whether it violated any law of the land or any rule of public policy, were purely questions of law, to be determined by the court. Therefore no averment could give to the agreement a character which it had not, and no admission could take from it the character which it had.

Mallan v. May, 11 Mee. & W. 652, was an action upon a cov-

enant not to carry on the business of a surgeon dentist in London, or in any of the places or towns in England or Scotland where the plaintiffs might have been practicing, within four years, for which term the agreement ran. Plea to the second breach assigned that the plaintiffs, before the expiration of the term, had practiced in many towns in England, and that divers of them were distant from each other one hundred and fifty miles; wherefore the said stipulation was an unreasonable restriction of trade. Upon demurrer, the plea was held bad for attempting to put in issue a matter of law.

The county court, then, we think, properly assumed the responsibility of passing upon the nature and effect of the agreement, and I come now to consider the gravest question presented upon this record, to wit: whether that court erred in its estimate of the character of that agreement.

The plaintiffs in error aver that this agreement "tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce the price of the commodity of wheat, and to stifle fair and lawful rivalry and competition of dealers therein," and this view was enforced by an argument of great length, and exhibiting much ingenuity and research.

Before proceeding to discuss the question whether this agreement does in fact contravene public policy, I desire to refer to the very happy and every way timely remarks of Mr. Story. He says: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against public policy." Story's *Conf. L.*, sec. 546.

And I desire to add that, as a general rule, the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses. And a legislative enactment would seem to be the least objectionable form of exposition, for these two reasons: 1. Because it would operate prospectively as a guide to future negotiations, and would not, like a judgment

of a court, annul a contract already concluded in good faith, and upon a valuable consideration; and, 2. Because a rule so established has a wider circulation among the people, and enters more generally into the information of the public.

I by no means intend to deny the right or the propriety of judicially determining that a contract which is actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state.

And having ventured upon these few preliminary reflections, I disclaim all aid from any one of them in the determination of this cause, but I affirm, that, upon the spirit of the letter of the law, as it has been adjudicated for one hundred and forty years, the agreement disclosed in the plea of the plaintiff in error is not against public policy.

Contracts against public policy are divided, by Mr. Story, into seven classes, as follows: 1. Contracts in restraint of trade; 2. Contracts in restraint of marriage; 3. Marriage brokerage contracts; 4. Wagers and gaming; 5. Contracts to offend against the laws and public duty; 6. Usury; and, 7. Trading with an enemy.

This agreement clearly does not fall under either of the six heads last above mentioned. If objectionable at all, then it must be as a contract in restraint of trade. In that light alone it was considered by the counsel for the plaintiffs in error upon the agreement.

But contracts in restraint of trade are divided by Parker, J., in *Mitchel v. Reynolds*, 1 P. Wms. 181, into involuntary and voluntary, the former comprising restraints arising from either—1. Grants or charters from the crown; 2. Customs; or, 3. By-laws—and the latter comprising those restraints which arise from the agreement of parties.

When I have said, then, that the agreement we are considering most certainly does not present a case of involuntary restraint,

I think I have dispensed with the necessity of examining that large class of cases cited by counsel upon the argument, and which arose upon royal grants and charters, customs or by-laws. These decisions rest upon reasons applicable to those cases and different from the reasons which have entered into the adjudications upon cases of voluntary restraint.

These latter cases are again distinguished as—1. General; or, 2. Particular, as to places or persons or time.

A general restraint which is defined to be “an agreement not to carry on a certain business anywhere,” Story’s Conf. L., sec. 550, is against public policy and void. So it was held after several arguments in *Mitchel v. Reynolds*, *supra*, and the doctrine has been affirmed and reaffirmed in numerous cases since, and I am not aware of the propriety of the rule being questioned in any single case. Parker, J., in *Mitchel v. Reynolds*, states the reasons upon which the rule is founded as follows:

“First, The mischief which may arise from them: 1. To the party by the loss of his livelihood, and the subsistence of his family. 2. To the public by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to, as for instance, from corporations who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves. 3. Because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other.”

I do not notice here the fourth and fifth reasons assigned, because the fourth is declared by the learned judge to be in favor of the contract, and so opposed to the rule, and the fifth applies to contracts with a consideration, which he evidently supposes to be without the rule, and which he says the law is not so unreasonable as to declare void, “for fear of an uncertain injury to the party.”

Now, in applying the rule to any given case, it is important that we attend to the reasons upon which it is founded: “Who so knoweth not the reason of the law, knoweth not the law.”

And in regard to the reasons above stated, I have to say that

I very much question whether, here in Wisconsin at the present time, and in view of our present social and political position, more than one of them is entitled to any considerable importance in our consideration. The opportunities for employment are so abundant, and the demand for labor on all sides is so pressing and urgent, and the supply so limited, that I much question, were we to consider the subject as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family, by an agreement which merely excluded him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural, and commercial industry open to him.

And while we have no privileged classes here, but little individual and less associated capital; and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting, and so remunerative, giving to labor the greatest field for competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantages in trade or to reduce it to few hands.

While so much more remains to be done than all hands can do, I question if the better way to foster individual effort be not to secure it the greatest possible freedom, either to direct it to any particular calling, or to abandon that calling to another for an equivalent.

And while apprentices are sought for oftener than they seek apprenticeships, we need hardly fear, I think, that they will be subject to great vexation by their masters on account of any anticipated prejudice to their custom. Besides, if such indirect practices should be resorted to here to obtain similar bonds as Lord Macclesfield says was the case in his time, perhaps the court would find those indirect practices themselves as good a pretext for setting aside the bonds as any real or fancied injury to the public policy arising therefrom would afford.

As to the third reason, I apprehend it would be thought a dangerous precedent were a court to annul any other voluntary bond for which a voluntary consideration has been received, upon the ground that it was of no use to the obligee. Ordinarily, we say, let parties who are competent to contract determine for themselves what contracts will profit them. And certainly I do not understand why that should be called a certain loss on one side, when for what the party has abandoned he has received an ample equivalent. If the loss is supposed to arise

from a total want of consideration, or from its inadequacy, these are distinct grounds for interference.

It is enough, however, that one good reason still remains to uphold the rule. The loss to society of a valuable member is as great a public injury now as it ever was, and as great here as anywhere. I hope, indeed, that the market value of a human being is higher now than it was in England at the beginning of the eighteenth century, when the case of *Mitchel v. Reynolds* was decided. The capacity of an individual to produce (using that word in its largest sense) constitutes his value to the public. That branch of industry in which a man has been educated and to which he is accustomed, and for the abandonment of which he demands compensation, is supposed to be the one in which he can render the greatest profit. The value of what he produces belongs to himself. The actual product belongs immediately to him who employs him, but mediately to the state, and goes to swell the aggregate of public wealth. Therefore the law says to each and every tradesman, You shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if any man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect, you are held discharged from such bargain, because of the advantage that will arise to the public from so holding.

But none of these reasons apply to what are called partial or limited restraints, or to agreements not to exercise a particular calling in a particular place. Indeed, these seem to be not so much restraints upon trade as upon tradesmen. For when a silversmith obligates himself not to pursue that particular business in Milwaukee, the trade need not necessarily be restrained thereby, for he can pursue it if he pleases in Racine, or elsewhere in the state; and to all legal intendment with equal advantage to himself and to the public. Accordingly, such agreements have uniformly been upheld by the courts when founded upon a sufficient consideration.

This modification of the rule is said to have obtained as early as 1621: *Broad v. Jollyfe*, Cro. Jac. 596. In *Mitchel v. Reynolds*, 1 P. Wms. 181, the law is declared so to be, and so to have been.

The cases which have been decided in accordance with this doctrine are numerous. I will only instance *Bunn v. Guy*, 4

East, 190, where an attorney bound himself not to practice within London, and one hundred and fifty miles from thence. In *Leighton v. Wales*, 3 Mee. & W. 545, the restraint was against running any coach on a particular road: *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]; *Palmer v. Stebbins*, 3 Pick. 188 [15 Am. Dec. 204]; *Pierce v. Woodward*, 6 Id. 206; *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 158; *Perkins v. Lyman*, 9 Mass. 522, which latter case arose upon an agreement not to be interested in any voyage to the north-east coast of America, or any traffic with the natives of that coast, for seven years, and the agreement was adjudged good.

Now it is manifest that, by every known rule of construction, the agreement exhibited to us in the defendant's plea is one falling within the principle of the cases above cited. The restraint it imposed upon trade, if any, was partial and limited—limited in every particular referred to in the books: it was limited as to persons, as to object, as to place, and as to time (though this last is not essential); as to persons, it was limited to the proprietors of eleven warehouses; as to object, it was limited to the traffic in wheat; as to place, it was limited to the Milwaukee market; and as to time, to a period of about seven months.

It was indeed objected upon the argument that there was nothing upon the record to show the extent of the Milwaukee market. But surely this objection can not be well taken. Admitting, for the purpose of the argument, the law to be that only so much restraint upon the obligor will be upheld by the courts as shall appear to the court to be necessary to the protection of the obligee, still the agreement is before us, and if we are to construe it as a contract, and with reference only to the apparent intention of the parties, I think we would find no difficulty in holding that the contracting parties intended by that term to confine themselves to the market in Milwaukee, a city which we judicially know to exist, and the market or place of sale in which, I think we may legally infer, is not more extensive than the boundaries of the city.

If, on the contrary, we are to construe it as a part of the plea in the case, having reference to that degree of certainty requisite in good pleading, I have simply to remark that whatever is uncertain in this behalf is the fault of the plaintiffs in error, from whom the pleading comes; and because they have not averred the Milwaukee market to have an unreasonable extent, we are to presume that it has not: 1 Ch. Pl. 345. In either point of view the restraint was limited, and the limits were reasonable.

But the parties are said to have combined and agreed not to engage in trade, and that this was clearly against public policy; and in the plea, the plaintiffs and defendants, together with divers other persons, are averred to have formed themselves and entered into an association. Let this matter be understood, and we need not be frightened by the terms employed to characterize it. The agreement discloses no combination and no association in the sense in which the words are evidently used. It is of two parts. It creates mutual obligations, and provides mutual equivalents, as every contract, *inter partes*, does. But there is no identity of interest or of duty between the parties of the second part, no more than always exists between landlord and tenant. The warehousemen received their daily compensation, and the millers received their daily profits.

And there was no combination between the parties of the second part, the warehousemen. Perhaps they must be considered to have jointly promised the party of the first part, but it is not disclosed that they have promised each other, which, I understand, they must have done before they can be said to have combined. Besides, if the design be lawful, as the abandonment of trade in a particular place is, what matter how many combine in it? But at all events, it is said that, as creating a particular restraint, the contract is *prima facie* bad; and the facts and circumstances which will justify it, if any such exist, should be made to appear.

And upon this point the authority of Lord Macclesfield is again invoked, who says, in *Mitchel v. Reynolds*, that "a particular restraint is not good without just reason and consideration." And again: "In all restraints of trade, where nothing more appears, the law presumes them bad." Special circumstances may exclude the presumption, and the court is to judge of those circumstances and determine accordingly, and if, upon them, it appears to be a just and honest contract, it ought to be maintained.

What were those special circumstances in that very case? Why, that the plaintiff was the assignee of a lease of a messuage and bake-house in Liquor Pond street, in the parish of St. Andrews, Holborne, for the term of five years. This was held a sufficient reason to support a covenant not to exercise the trade of a baker within that parish during the said term.

What are the special circumstances in this case? The obligees are the proprietors of several mills, in the city of Milwaukee, for the manufacture of wheat into flour. Will any one presume to

say here is not as good a reason for upholding a promise not to traffic in wheat, in Milwaukee, to the prejudice of these proprietors, for the term of seven months?

But how should these special circumstances be made to appear? By averment in the pleadings and by proof upon the trial? Certainly not. It was not so in the case just cited. They appeared upon the face of the instrument sued upon, by way of preamble to the conditions, were set out on prayer of oyer, and the question arose upon demurrer to the declaration.

Here these circumstances appear in the agreement which is set out in the plea, and the question arises upon demurrer to the plea.

It is insisted further that the contract of the twenty-ninth of December, 1849, discloses an attempt to create a monopoly of the wheat market. And in support of this position we are again referred to the leading case.

"It may be useful," says Parker, J., "and lawful to restrain him from trading in some places, unless he intends a monopoly, which is a crime."

But the word "monopoly" is used to signify something which is very different from aught that could have been intended by this contract. The learned judge himself interprets it in another part of the same opinion. He says, "that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law." He adds that when restrained to particular places or persons, if lawfully and fairly obtained, the same is not a monopoly.

Now could the parties possibly have intended by this simple contract to vest in the mill owners the sole exercise of the traffic in wheat throughout the state of Wisconsin? If so, there was the most extraordinary disproportion of means to the end ever betrayed in the negotiations of business men. But they intended nothing of the kind. Not even a monopoly of the market in Milwaukee. On the contrary these mill owners who desired to purchase wheat for manufacturing, evidently sought to protect themselves against the competition (doubtless often sharp and injurious) of the warehousemen.

The obligors possessed large facilities as warehousemen, vessel and dock owners, for storing and freighting the produce which came to that market. Their interests led them to deal in that produce in the bulk, because so it would pay the most storage and the most freight. On the other hand, to give employment to their mills, the obligees sought the same produce for manu-

facture. Here their interests clashed. The contract before us is the result of a compromise of those conflicting interests. And if the argument needed any such beggarly support, I think it might well be asked if the public interests were not promoted, rather than prejudiced by an arrangement which saved wealth to our state the earnings from the manufacture of so large a quantity of wheat as we may reasonably suppose to have been floured in the Milwaukee mills, and which, but for this arrangement, would have been floured in the mills of some eastern state.

I waive this consideration. I say there was no monopoly intended, none effected. We can not fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee the market was open to the fiercest competition of all the world, except these obligors.

True, the language of the contract is, that the parties of the second part "agree to give the parties of the first part full, absolute, and uninterrupted control of the Milwaukee wheat market;" and had it stopped here it might well have been urged that there was an agreement for a monopoly of the trade in that market. And if that had been the only market for Wisconsin (which it is not), it might well be said the agreement was as pernicious as an agreement to strike the sun from the system. Either, if performed, would be ruinous to the farmers of Wisconsin; but I submit that the impossibility of performing would constitute as good a reason for holding either of them void as the injurious consequences certain to result from performance. But this stipulation is qualified by adding the words, "so far as they shall be able to do so," and had they stopped here, to any objection that a monopoly was agreed upon, it might well be answered, that the giving of such control or such monopoly (if they are synonymous terms) of the Milwaukee wheat market as those parties could give, was no monopoly at all. But the agreement is still further limited by the words "by virtue of their capacity of warehousemen, vessel and dock owners."

It is, then, simply an agreement to give to the mill owners such control of that market as they can give by virtue of those specified employments. In other and equivalent terms, it is a transfer of such control as the obligors possessed in right of their employment as warehousemen, etc. Such are the general terms selected by the draftsmen to express the complete abandonment of that trade in that market to the obligees.

Personally, the obligors were to do nothing to confirm the mill owners in that trade to the exclusion of anybody but themselves. Accordingly they go on to render the nature and meaning of the stipulation more definite, by specifying several things which the parties of the second part shall not do, but not one which they shall do.

It is unnecessary to examine the cases cited by counsel in support of the proposition I have here been combating. They all arose upon royal grants or by-laws, and consequently were cases of involuntary restraints. They do establish the doctrine that the grant of a monopoly is void; but they do not support the averment of the plaintiff in error, that this contract disclosed a monopoly. Upon this point better authority may be found in the language used by Bronson, J., in *Chappel v. Brockway*, 21 Wend. 157. To a similar averment he replied: "The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise."

But the crowning objection urged against the validity of this agreement is, that it tends "to depress the wheat market, to reduce the price of the commodity of wheat, and to stifle the fair and lawful rivalry and competition therein." It is quite observable that the word "stifle" is used more adroitly than aptly. But if its use is insisted upon, I admit that it does tend to stifle the competition of these obligors, and I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting, has not before been denied or questioned for two hundred years, unless two cases, *Hooker v. Vandewater*, 4 Denio, 349 [47 Am. Dec. 258], and *Stanton v. Allen*, 5 Id. 434 [49 Am. Dec. 282], are to be considered as denying the right. Nor can I perceive how this agreement can reduce the price of wheat below its actual market value.

Wheat, being an article of almost universal consumption, has a market everywhere, and a value in every market. And that value in any particular place is determined less by the number of purchasers in that place than by its distance from and means of communication with the great central markets of the country and of the world. It is fluctuating, to be sure, but usually it is very accurately ascertained and well understood by the peo-

ple. And I can not suppose that the agreement of those warehousemen not to purchase that great staple upon their own account would affect its value more than the agreement of so many brokers not to take foreign gold in a particular place would diminish the current value of such coin. Even if this contract had removed all competition from that market, and the mill owners had taken advantage of that exemption to lower their bids, one of two results must have followed. Either that product would have been wholly driven from the market or new competitions would have entered the field to purchase. Either result would have defeated the very object which the parties had in view. It was said, indeed, upon the argument that foreign capital was excluded from the market by this contract, because the essential facilities of trade were denied thereto. But the agreement will not warrant any such interpretation. On the contrary, the power to close the warehouses against the storage of wheat, or to demand exorbitant prices therefor, is denied to the obligees by the express terms of the instrument.

Numerous cases were cited upon the argument in support of this last averment. Few of them, however, bear any analogy to the case before us. Most of those cases arose upon secret agreements not to bid at auction sales or upon the employment of secret bidders. All such secret arrangements are very properly discountenanced by the courts and forbidden by the law. They are frauds upon the party who is uninformed of them and who acts in good faith.

When a man publicly offers his property to the highest bidder at an auction sale, thereby obligating himself to take the highest sum offered for it, however disproportioned that sum may be to its actual worth, it seems very reasonable that he should be protected against secret agreements between the bidders, by which one may be enabled to make the purchase upon his own terms. No such consequence could follow the making of the contract we are considering, for the simple reason that the obligees were not enabled thereby to purchase a bushel of wheat unless they offered a price for it which the vendor chose to take.

But the distinction between the case at bar and the case referred to is too apparent to require illustration. And I would not have felt called upon to notice those cases at all, but that they have been supposed to sustain two other decisions pronounced by the supreme court of New York, and which are claimed by the plaintiffs in error to be entirely decisive of the

main question presented upon this record. I refer to the cases of *Hooker v. Vandewater*, 4 Denio, 349 [47 Am. Dec. 258], and *Stanton v. Allen*, 5 Id. 434 [49 Am. Dec. 282]. These cases arose upon contracts between different transportation companies upon the Erie canal, by which the parties agreed to stock their capital, and turn their earnings into a common fund to be then apportioned between the different proprietors under certain regulations contained in the articles of agreement.

The purpose assigned for the arrangement was the establishing of fair and uniform rates of freight, so equalizing the business among themselves as to avoid all unnecessary expense in doing the same. In the case first mentioned the agreement was held to be void as conflicting with a statute of that state. In the second case the same court held the agreement void at common law. In the former case, Jewett, J., remarks: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal to it." And in the latter case, McKissock, J., observes that: "While the introductory terms of the agreement proposed nothing apparently objectionable, the ultimate object is very manifest, and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition." And again: "As the canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state. If, then, in addition to the evils already pointed out as incident to this confederacy, a diminution of the revenue of the state would follow, of which there can be no doubt, as our canals have rivals by no means impotent in the great inland carrying trade of the north and west, the question whether the association can be upheld, becomes one of momentous import."

Such reasons are assigned in support of the judgments pronounced in those cases. I would be reluctant to subscribe to them. I think it would be unsafe to adopt as a rule of law every maxim which is current in the counting-room. It was said some three hundred years ago that trade and traffic were the life of every commonwealth, especially of an island: *City of London's Case*, 8 Co. 125.

If it be true also that competition is the life of trade, it may follow such premises that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market-place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of *Stanton v. Allen*, 5 Denio, 434 [49 Am. Dec. 282], it should have been urged against the agreement that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade ever since the case of *Mitchel v. Reynolds*, *supra*, was decided. And upon the argument of this cause it was earnestly contended that some such object should have been expressly averred by the plaintiff in his declaration, in order to support the restraint imposed upon the lessor by one of the covenants in the lease declared upon.

But upon the abstract question whether the agreements disclosed in those cases did contravene public policy, the decisions therein pronounced are entirely conclusive upon us. And if the policy of that great state imposes upon her citizens the obligation of unrestrained and unrelenting competition in the business of transportation upon her canals, in order to swell the revenues from that already munificent source, I have nothing to urge against it.

I am not sure I should have discovered the rule applied in the determination of those cases, had it not been disclosed to me by the high authority of that court. Entertaining the views

I do of the extreme caution to be observed in setting aside *bona fide* contracts in behalf of public policy, I am not sure I should have found, as a legal presumption, that when the parties to those contracts had combined their efforts and capital in order to diminish their expenses and increase their profits, they would have so abused the advantages thereby secured as to drive the carrying trade into the hands of those potent rivals, and thus sacrifice all profit.

But entirely controlling as those judgments are upon the question decided, they are far from being decisive of the case before us; for those agreements are broadly distinguished from the one I am considering, in the following characteristics: The theater upon which the restraint was imposed by those contracts was the property of the state, was built by the state, from which the state received the revenues. Here the theater is the city of Milwaukee, from which the state receives no revenue except what is derived from ordinary taxation. There the theater was the only one within the state affording like facilities to the same trade. Here the city of Milwaukee is only one (though doubtless the most considerable) of very many markets within the state for the sale of wheat. There the combination comprised, in one case, a large portion, and in the other, all the facilities employed upon the canal. Here the record does not inform us what portion of the facilities for the wheat trade existing in Milwaukee are placed under the control of the mill owners. There, an unlimited power was reserved to raise the price of transportation. Here the right to increase the price of storage above four cents per bushel is expressly denied.

Because, therefore, the restraint imposed by this agreement is limited and reasonable, and because it is supported by a good consideration, in the judgment of this court, the same does not contravene public policy, is not void; and the judgment of the county court must be affirmed.

CONTRACT WHEN VOID AS AGAINST PUBLIC POLICY: See *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 53 Am. Dec. 742; *Spalding v. Preston*, 50 Id. 68; *Stanton v. Allen*, 49 Id. 282, and cases cited in the note.

DEMURRER TO PLEADING, WHAT ADMITS: See *Stout v. Keyes*, 43 Am. Dec. 465, and note; *Hanna v. McKenzie*, Id. 122.

CONTRACTS IN RESTRAINT OF TRADE: See the note to *Pike v. Thomas*, 7 Am. Dec. 741, discussing this subject; *Bowser v. Bliss*, 43 Id. 93.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LAWSON v. STATE.

[20 ALABAMA, 65.]

INDICTMENT FOR LIVING "TOGETHER IN FORNICATION" found against a man and woman is sufficient, without stating the facts which enter into the composition of the offense.

ON CHARGE OF ILLICIT INTERCOURSE WITHIN LIMITED PERIOD, EVIDENCE OF ACTS ANTERIOR to such period may be adduced in explanation of acts of a similar character within that period, although such former acts if treated as an offense would be barred by the statute of limitations; evidence of this character would not however be admissible as independent testimony, but should be received when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined.

ON CHARGE OF ILLICIT INTERCOURSE, EVIDENCE OF IMPROPER FAMILIARITIES, explained by the fact of prior intercourse, may be corroborated by proof of subsequent illicit connection.

CONFESSIONS OF ONE DEFENDANT, ON TRIAL OF TWO JOINTLY FOR ILLICIT INTERCOURSE, are admissible against the party making them.

CONFESSIONS OF ONE DEFENDANT TENDING TO PROVE SUBSEQUENT ILLICIT INTERCOURSE are admissible against the party making them on the trial of an indictment of two defendants jointly for living together in fornication, if their relevancy is shown from facts subsequently offered in evidence.

EVIDENCE PRIMA FACIE IRRELEVANT MAY BE REJECTED at the time it is offered, or the court may let it in and repudiate it, if, after all is heard, it is still irrelevant.

COURT COMMITS NO ERROR IN ADMITTING IRRELEVANT TESTIMONY, if it appears affirmatively from the record that the evidence became relevant by its connection with other testimony subsequently offered.

EVIDENCE THAT DEFENDANT REFUSED TO PAY FOR SERVICES OF PHYSICIAN rendered during the confinement of his co-defendant, and his statements

that the child was not his, not being connected with any conversation or admission offered by the state, is not admissible on the trial of a man and woman jointly indicted for living together in fornication.

FACT OF ILLICIT INTERCOURSE CAN VERY RARELY BE DIRECTLY PROVED, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances.

FACT THAT UNMARRIED WOMAN IS SEEN IN NIGHT-TIME AT HOUSE OF SINGLE MAN, who is sick at the time, in company with her mother, by itself and unconnected with every other fact, proves nothing; but when offered in connection with other evidence proving illicit intercourse between them, becomes relevant, on their joint indictment for living "together in adultery."

CONVERSATION SHORTLY AFTER BIRTH OF CHILD BETWEEN MOTHER OF DEFENDANT AND PHYSICIAN who attended the defendant during her confinement, as to the means by which the physician was to obtain his fee, during which the defendant remains silent, is not admissible against the defendant on an indictment of her and her co-defendant for living together in fornication.

INDICTMENT of defendant as follows: State of Alabama, Macon county. The grand jurors for the said state, sworn and charged to inquire for the said county, upon their oaths present, "that John Lawson and Mary Swinney, on the first day of January, 1849, and from that day to the finding of the indictment, lived together in fornication." The state, to prove the charge, offered evidence that more than a year before the indictment Mary Swinney had been seen in company with her mother, in the night-time, at the house of Lawson who was sick at that time. This evidence was offered in connection with other evidence, with the express intention of connecting it with evidence to be subsequently introduced. The state with the same intention offered evidence of acts committed previous to that time, tending to prove illicit intercourse between defendants. This evidence was objected to, but the objection was overruled. The state also offered evidence of acts committed subsequent to the indictment, tending to prove illicit intercourse between the parties, and the evidence was admitted against the defendant's objection. One Dr. Mabson was also offered as a witness for the state, and he testified that he attended Mary Swinney during her confinement; that Mrs. Swinney was in the room at the time; that a few minutes after the birth of the child, he asked Mrs. Swinney where he was to get his fee, and she replied that he must look to Lawson for his fee, as she had sent to him to send for a doctor. The doctor further testified that Mary Swinney remained silent during this

conversation. The evidence was expressly offered only as to defendant Mary Swinney, the state undertaking to connect it with other evidence to be introduced subsequently. The state also offered as evidence against Mary only her confession that the child was Lawson's. The defendants offered to prove by Dr. Mabson, that when the latter applied to Lawson for his fee, Lawson refused to pay him, saying the child was not his. This evidence was excluded. The defendants were convicted and brought error.

Rice and Morgan, for the plaintiffs in error.

M. A. Baldwin, attorney general, *contra*.

By Court, GOLDTHWAITE, J. We think the court below did not err in overruling the demurrer to the indictment. If a single act of fornication was indictable, it might, perhaps, be necessary to allege the constituents which make up the offense, although even then, upon the reasoning of the case of *State v. Hinton*, 6 Ala. 365, it would be sufficient to charge the offense in the terms of this indictment. But entertaining some doubts as to the correctness of the reasoning in the case cited, we prefer to rest our decision on different grounds. The offense contemplated by the statute, Clay's Dig., 431, sec. 3, was not a single act, but the living together in fornication; and the facts which enter into the composition of this offense are necessarily so complicated that it is impossible to state them so that the legal conclusion of guilt will result with certainty and precision, and for this reason it is unnecessary to allege them. A similar rule prevails, and for the same reason, in an indictment for keeping a common bawdy-house, in which the statement of the character of the house, in general terms, is sufficient, without alleging the particular constituents which make up a house of that description: 1 Ch. Crim. L. 141. So also an indictment charging the defendant with soliciting a servant to rob his master was held good, without stating the means of solicitation: *Rex v. Higgins*, 2 East, 4; and in the case of *Rex v. Fuller*, 1 Bos. & Pul. 180, it was held, that the charge of an endeavor to incite a soldier to mutiny in general terms, although a felony, was sufficient. The same principle was also recognized by this court, in *Sterne v. The State*, 20 Ala. 43, decided at the present term, in which it was held, that where the offense was complicated, consisting of repetition of acts, or where it was continuous in its character, not implying a single act or any given number of acts, the use of the general term was sufficient.

Neither is there any force in the objection that the indictment purports on its face to be found by the grand jurors for the state, sworn and charged for Macon county: *Morgan v. The State*, 19 Ala. 556.

The other questions involve the correctness of the admissibility of the evidence set out in the bill of exceptions, every divisible portion of which was objected to. The greater portion of this evidence related to acts occurring more than twelve months before, or at some period subsequently to the finding of the indictment; and assuming for the present that such facts conduced to establish the criminal intercourse of the defendants below, at the time to which they referred, the question is presented with reference to its admissibility in one aspect only, and that is, as to the time within which the evidence of acts of this character is to be confined. We entertain no doubt that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, that evidence of acts anterior to such period may be adduced, in explanation of acts of a similar character within that period; although such former acts, if treated as an offense, would be barred by the statute of limitations: 2 Greenl. Ev. 36. Evidence of this character would not, however, be admissible as independent testimony, and if so offered should be excluded, but should be received when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined, or in the present case to the time covered by the indictment.

As to the admissibility of evidence, tending to show the criminal intercourse of the parties at a period subsequent to the indictment, there is more difficulty, and after a careful examination, we have been unable to find a case in which this point has been directly decided. The proposition, as a general rule, that acts of indecent familiarity may be explained by proof of the subsequent adultery of the parties, we should doubt, and we think we can see valid objections against it; but that subsequent acts of criminal intercourse can, under no circumstances, be received in explanations of such familiarities, is, we think, equally erroneous. When we concede the correctness of the rule that previous acts may explain subsequent familiarities, it follows, that what is but an inference in the mind of the jury created by the evidence of improper familiarities, explained by the fact of prior intercourse, may be corroborated by proof of subsequent

illicit connection, which then becomes confirmatory or cumulative evidence. It will be observed, that upon the principle on which we have placed evidence of this character, it is *prima facie* irrelevant, and that when offered, its relevancy should be shown by its connection with acts already in evidence, or its proposal with facts subsequently to be established. There is also another principle upon which evidence of this character may be received in cases like the present. The fact to be established by the evidence is, that the parties lived together in a certain condition; and if this particular condition of life was proved to exist, both anterior and subsequently to the time alleged in or covered by the indictment, an inference might often be correctly drawn as to the existence of this condition during the intermediate period. We would not be understood to say that this inference would exist in every supposable case in which such proof could be made; in some instances, the two periods at which the particular condition was proved to exist might be so far apart as to afford no reasonable inference as to the intermediate time, and in that case the evidence would be inadmissible. In every case, also, much would depend upon the character of the condition; but when the intermediate period was not so long as to be inconsistent with the nature of the condition proved, or when such evidence is offered in explanation of other facts already established, indicative of such condition, it is then relevant, and may in many cases be conclusive. Having stated the conclusions we have attained in relation to acts outside of the period covered by the indictment, in the aspect in which we have considered it, it follows that the objections to its admission, on the ground that it referred to acts occurring more than twelve months before or at any given period after the indictment was found, can not be sustained.

It is, however, urged that the admissions of one of the defendants, if admissible in all other respects, should have been rejected for reasons peculiar to the nature of the offense charged; that on the trial of an offense which can not, from its constitution, be committed by one person, and where all who are charged with its commission are tried together, that any evidence which tends to establish the guilt of one, and one only, can not be received. We have examined with some care the authorities which have been cited in support of this proposition, but do not find that they sustain it. The case of *The State v. Jolly and Whitley*, 3 Dev. & B. L. 110 [32 Am. Dec. 656], was an indictment of the same character as in this case; and the defendants being tried

together, the husband of the female defendant, who had been divorced, was admitted against the objection of the defendants, to give evidence of their adulterous intercourse during the marriage. This evidence was held to be improperly admitted; and Judge Gaston, in delivering the opinion, intimates that had the male defendant been tried alone, the evidence of the husband as to the same facts against him would have been inadmissible, not by reason of the joint nature of the offense, but because the prohibition of husband and wife to testify against each other applied, not only when the testimony tended to convict, but when it tended to criminate or degrade. The case of *The State v. Welch*, 26 Me. 30 [45 Am. Dec. 94], turned upon the same principle, and the husband was held an incompetent witness simply upon considerations of policy, resting on the marriage relation. To the contrary of the position taken for the plaintiffs in error we find that in the case of joint offenses, where more than one defendant is on trial, it is the well-settled practice to admit the confessions of one party against himself—the court cautioning the jury that they are to operate against such party only, and that the other defendants can not be convicted except upon evidence *aliunde* sufficient to establish their guilt. It follows that the objection to the admissions on this ground is untenable.

The admission of the female defendant below that Lawson was the father of the child of which she was delivered in the summer of 1850, tended to prove illicit intercourse between herself and Lawson at a time subsequent to the finding of the indictment, and was, under the rule we have established, admissible if offered under circumstances which rendered its relevancy apparent to the court. Conceding, however, that it was not so offered, that its relevancy did not appear at the time it was proposed, yet its relevancy does appear from the facts shown by the record to have been subsequently offered in evidence.

In this aspect of the case the question of practice is raised as to the effect of admitting evidence *prima facie* irrelevant, which is received against the objection of the opposite party, and without its relevancy being in any way shown to the court at the time it is offered. All the authorities agree that in such case it is the better course for the court to reject it: *Van Buren v. Wells*, 19 Wend. 203; *Weidler v. The Farmers' Bank of Lancaster*, 11 Serg. & R. 134; *Rex v. Fursey*, 6 Car. & P. 81; *Davis v. Calvert*, 5 Gill & J. 269, 304 [25 Am. Dec. 282]. But it is equally clear, upon the same authorities, that while the court may reject it in the first instance, it is not bound to do so, but may

let it in and repudiate it, if, after all is heard, it is still irrelevant.

It follows that if it appears affirmatively from the record that the evidence objected to became relevant by its connection with any other testimony subsequently offered, the court committed no error in its admission, or at least not such a one as the party objecting could avail himself of in an appellate court. We have considered the last question with reference to one portion of the testimony only, but an examination of the record will show that the same principles are applicable to other portions.

The evidence offered by the defendant Lawson, of his refusal to pay for the professional services of the physician rendered during the confinement of the other defendant, with his statement that the child was not his, not being connected with any conversation or admission offered by the state, was properly rejected. To have allowed it would have been permitting the defendant to make evidence for himself.

Another objection urged against a large portion of the testimony is, that it did not tend to establish any of the ingredients entering into the consummation of the offense charged without regard to time; that it tended neither to establish the living together of the parties, nor their illicit intercourse at any period. Upon this head it may be remarked that the fact of illicit connection is one which, from its nature, can very rarely be directly proved, and must in the great majority of cases be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances. Facts apparently trivial, and innocent in themselves, sometimes derive importance from their connection and combination with other facts. That the parties were frequently seen riding together in a buggy would, as an isolated and independent fact, prove nothing; but the criminal intercourse between the parties once established, their continued intimacy, as denoted by acts of this character, might be entitled to much weight, as determining upon the question as to the continuance of such intercourse. The intimate association of a man with a female of known impurity is of itself a circumstance of some significance; and in all cases of this character, whether civil or criminal, the legal rule follows the rational interpretation: 2 Greenl. Ev., sec. 44.

The evidence with which the court has had the most difficulty, in arriving at what it deems a correct conclusion in this view, is the evidence first offered on the part of the state, showing the

presence of the female defendant at the house of Lawson, in the night-time, in company with her mother, in the year 1848, and the conversation proved by the witness Mabson, which occurred in the presence of the defendant Swinney, against whom only it was offered. The fact that an unmarried woman is seen in the night-time at the house of a single man, who is sick at the time, in company with her mother, it is true, by itself and disconnected from every other fact, proves nothing, and it would be as unjust as uncharitable from that circumstance alone to draw any deduction unfavorable to the virtue of the female. But this evidence was not offered by itself and as an independent fact; it was proposed to be connected with other testimony subsequently to be offered; and the record informs us that in 1847 circumstances, which it is unnecessary here to detail with particularity, were proved, tending to show an act of illicit connection between them at that time in Chambers county; that in 1846 the defendant Swinney was seen alone at Lawson's house at an early hour in the morning, and that from 1845 to 1851 she was frequently seen going to and from his house, and during the same period they were frequently seen riding in a buggy together. We are of opinion that, in connection with this evidence, the testimony referred to became relevant. If the jury believed that the defendants were criminally intimate in 1847, the fact that the guilty female was seen at the house of her paramour in the night-time, although he was sick, and she was accompanied by her mother, is a fact tending to show that their intimacy still continued, and might properly go to the jury, to be estimated by them.

The conversation which was detailed by the witness Mabson we regard as inadmissible. It could only be received as an implied admission against the female defendant, on the ground that by her silence she assented to the correctness of the conclusion that her co-defendant was the proper person for the physician to look to for the payment of his professional services for attention during her confinement. The rule laid down by all elementary writers, as the result of the adjudged cases, in relation to evidence of this character is, that it is to be received with the utmost caution, and never should be received at all unless the statement is of a character which naturally calls for a reply and the party to be affected by it is in a situation in which he would probably respond to it: 1 Greenl. Ev., sec. 197; *Commonwealth v. Kinney*, 12 Met. 235. Without considering whether the conversation was such as naturally to call for a

response from her, we all concur that her situation, as disclosed by the evidence, was such at the moment as to render it at least highly improbable that she would make any response. This being the case, under the influence of the rule above laid down it should not have been received.

In relation to the other portions of the testimony, we are unable to perceive any error in their admission. The attention of the female to the ordinary household duties of Lawson, the open and public intimacy of an unmarried man with a woman who had given the strongest proof of her want of chastity by the birth of an illegitimate child, were proper to go to the jury, to show the character of their intercourse at a time which, although after the finding of the indictment, might, in connection with the other facts establishing their intimacy at an antecedent period, throw some light upon the character of their intercourse during the intermediate time.

For the error, however, in the admission of the evidence of the witness Mabson, the case must be reversed, and the cause remanded.

IT IS NOT ERROR TO ADMIT EVIDENCE WHICH MAY BE MADE COMPETENT by the introduction of subsequent testimony: *Hamilton v. Summers*, 54 Am. Dec. 509. See also *Crenshaw v. Davenport*, 41 Id. 56; *Day v. Sharp*, 34 Id. 509.

ILLEGAL TESTIMONY SHOULD BE REJECTED WHEN OFFERED, AND NOT ADMITTED subject to subsequent exclusion when the court charges the jury: *McCurry v. Hooper*, 46 Am. Dec. 280.

JOINT INDICTMENT FOR FORNICATION AND ADULTERY-SUFFICIENT, WHEN: See *State v. Jolly*, 32 Am. Dec. 656; see also *Anderson v. Commonwealth*, 16 Id. 776.

FORREST v. COLLIER.

[20 ALABAMA, 175.]

DEFENDANT FALSELY AND MALICIOUSLY SUING OUT ATTACHMENT can not screen himself from liability by showing that the affidavits on which the attachment issued were insufficient.

DECLARATION NEED NOT AVER THAT AFFIDAVITS WERE IN WRITING in an action on the case for falsely and maliciously suing out an attachment.

DECLARATION IN ACTION FOR FALSELY AND MALICIOUSLY SUING OUT ATTACHMENT, as the agent of creditors, need not aver a want of probable cause, or that the attachment suit has ended.

EVIDENCE OF INTENTION OF PLAINTIFF TO REMOVE AND TAKE HIS PROPERTY OUT OF STATE is admissible, to be considered by the jury in determining whether the defendant acted wantonly, in an action against the defendant for falsely and maliciously suing out attachments against the plaintiff as the agent of creditors.

CASE against the defendant for maliciously suing out attachments against the plaintiff. Pleas: 1. Not guilty; 2 and 3, substantially, that the plaintiff was indebted to the plaintiffs in attachment in a large sum, and was about to remove out of the state so that the plaintiffs in attachment would lose their debts. The remaining facts are stated in the opinion. Verdict and judgment for the plaintiff. The defendant brought error.

Frierson, for the plaintiff in error.

P. and J. L. Martin, *contra*.

By Court, CHILTON, J. This was an action on the case by Collier against Forrest, for falsely, maliciously, and fraudulently going before a justice of the peace and suing out, as agent for a third person, an attachment against the plaintiff, when he had no authority from such person to sue out the same, and when execution on the demand was suspended by a stay bond, said Forrest himself being the security on said bond.

There is another count, which does not differ materially in its structure, except that it sets out the facts with more particularity, and avers that seven judgments were rendered by one Childress, a justice, which are particularly described, against said Collier and his partner, Faver. Executions were issued in due time, and stayed by the execution of a bond, with Forrest as surety thereon. That before the stay had expired, said Forrest went before the justice who had issued the executions, and in order to injure and oppress the said plaintiff, etc., falsely and fraudulently represented himself to be the agent of said plaintiffs respectively, in said seven judgments, made affidavits in the several cases, as agent, for attachments, and procured the same to be issued. The count avers he was not the agent at the time spoken of, had no authority to sue out the writs, and that said attachments respectively were falsely, maliciously, and vexatiously sued out, and were levied on certain property of the plaintiff, which was detained from his possession thereby, and he put to expense in defending, etc. This is the substance of the counts. They were demurred to in the court below, and the court having overruled the demurrer, their legal sufficiency is the first matter of inquiry.

We will consider the objections as the same are presented by the counsel for the plaintiff in error.

1. He insists that the counts being for a mere wrongful act, the plaintiff should have averred special damage. Without

deciding whether such averment, in this case, is necessary, we reply that in this case special injury is alleged, viz.: that by reason of the seizure, his property, of the value of two thousand dollars, has been lost to him.

2. That the facts sworn to did not authorize an attachment. We think this is not an important inquiry in this case. Whether in strictness of law the affidavit was such as would have supported the attachment, had a motion been made to quash the writ for that defect, we will not decide. It is sufficient that the affidavit was such as to call into exercise the jurisdiction of the justice over the case presented, and that the issue of the attachments was the immediate or proximate result of making the affidavits. The defendant below made the affidavits and procured the issue of the attachments thereon, and it is not to be tolerated, if he did it maliciously as well as unauthorizedly, that he should screen himself from responsibility by showing that he induced the justice to issue them upon affidavits which were not sufficient. It is certainly true that a mistake of the justice should not be allowed to prejudice Forrest; as if the latter had applied and made oath for an attachment, the justice had issued his warrant for some offense against the criminal law. But in this case he applies for attachments and gets them, and although they may not be regular, the injury to the defendants in the writs is not the less, nor are they less the immediate consequence of his unauthorized act: See *Ewing v. Sanford*, 19 Ala. 605.

3. This reasoning equally applies to the objection that the fact is not averred in the declaration that the affidavits were in writing. We repeat, that the regularity of the attachment proceedings is not before us. It is sufficient that the justice has by law jurisdiction over the subject of attachments, and that that jurisdiction was called into exercise by the malicious and unauthorized act of Forrest, as charged in the declaration.

4. It is said there is no averment of malice. The second count does aver that the act was done maliciously. The first does not use this term, but equivalent expressions, that it was done "wrongfully and fraudulently, to injure," etc.

5. The other objections, that there are no averments of the want of probable cause, or that the attachment suits have been ended, do not apply to a case like this, where the false and fraudulent representation of agency, resulting in consequent damage, is the gist of the action. Whether there existed cause for the attachments or not, so far as the creditors were con-

cerned, is only important as affecting the damages, and allowable, under the peculiar circumstances of this case, as explanatory of the motive of Forrest. His peculiar relation to the parties, standing as surety on the stay bond, and seeing his principal about to remove his property, so as, if effected, he would most likely have the debt to pay, while these facts did not authorize his act, and consequently constitute no bar to the suit, as the pleas suppose, yet they presented the case in a different light than that which would have characterized it had there existed no such relation, and no attempt by the principal to remove his property.

The principles above stated embrace all the points raised in this case, and show that the court did not err in sustaining the declaration, and adjudging the second and third pleas bad; but did commit an error in the exclusion of the testimony as to the intention of the defendant in error to remove and take his property to Louisiana. We repeat, that while this proof would not bar the action, it explains, to some extent, and is proper to be considered in determining whether Forrest acted wantonly.

Judgment reversed and cause remanded.

DEFECT OF PROCESS CAN NOT BE SET UP BY DEFENDANT IN ACTION OF MALICIOUS PROSECUTION, where the prosecution for which the action was brought was based on the process: *Kline v. Shuler*, 49 Am. Dec. 402.

MALICE AND WANT OF PROBABLE CAUSE, ALLEGATION OF, IS NECESSARY in an action for malicious prosecution.

ALL CIRCUMSTANCES TENDING TO SHOW DEFENDANT'S MOTIVES should be inquired into in an action for malicious prosecution: *Hitchcock v. North*, 39 Am. Dec. 540.

ACTION FOR MALICIOUS PROSECUTION, GENERALLY: See *Frowman v. Smith*, 12 Am. Dec. 265, and note discussing this subject.

SMYTH v. TANKERSLEY.

[20 ALABAMA, 212.]

CONTRACT BY WHICH OWNER LETS LAND AND IS TO RECEIVE PORTION OF PRODUCTS in payment and satisfaction of the rent is a letting of the land on shares, and the parties to the agreement are tenants in common of the products to be grown and divided between them.

ONE OWNER IN COMMON MAY SUE, WITHOUT JOINING HIS CO-OWNER, a sheriff who has sold the entire property in the goods, on an execution against the co owner after notice of the plaintiff's interest.

SALE BY OFFICER OF ENTIRE PROPERTY IN GOODS OWNED BY TWO JOINTLY, on an execution against one of them, is an abuse of his legal authority which renders him liable as a trespasser *ab initio*.

IF OFFICER SELLS ENTIRE PROPERTY IN GOODS OF CO-TENANTS ON EXECUTION AGAINST ONE, and receives the money, the other owner may waive the tort and bring *assumpsit* for the money.

ASSUMPSIT against the defendant, a constable, for selling under execution the entire interest in goods of which the plaintiff owned a quarter-interest, after having notice of the plaintiff's interest. The remaining facts appear from the opinion of the court. Judgment for the defendant. The plaintiff brought error.

Watts, Judge, and Jackson, for the plaintiff in error.

Elmore and Yancey, contra.

By Court, GOLDTHWAITE, J. The position taken by the counsel for the defendant in error, in this court, renders it necessary to determine the legal effect of the contract between the plaintiff in error and Childers. The terms of this contract are thus stated in the bill of exceptions: "That Smyth rented to the said Childers certain lands, on the following terms, to wit, that said Smyth was to have one fourth of all the products of said lands, rented as aforesaid, after deducting all expenses for bagging, rope, and hauling the cotton, which was to be in payment and satisfaction of the rent." If this contract was a lease, then the whole product of the land rented belonged to the lessee until the share of the lessor had been separated and delivered: *Stewart v. Doughty*, 9 Johns. 108; *Thompson v. Mawhinney*, 17 Ala. 362 [52 Am. Dec. 176]; while, on the contrary, if it was only a letting of the land on shares, then the parties to the agreement were tenants in common of the products to be grown and divided between them: *Hare v. Celey*, Cro. Eliz. 143; *Foote v. Colvin*, 3 Johns. 216 [3 Am. Dec. 478]; *Bradish v. Schenck*, 8 Id. 151; *De Mott v. Hagerman*, 8 Cow. 220 [18 Am. Dec. 443]; *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill (N. Y.), 234 [37 Am. Dec. 309]; *Bishop v. Doty*, 1 Vt. 37; *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Id. 191; *Maverick v. Lewis*, 3 McCord, 211.

In the case of *Thompson v. Mawhinney*, *supra*, it was decided by this court that a contract made with the owner of land, which the other party agreed to cultivate and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. In the contract under consideration, the mode of compensation adopted repels the conclusion that it could have been the intention of the parties that the land should not be cultivated,

and thus assimilates its terms more closely to the contract in the case last cited. It is true, the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be regarded, rather than the words: *Putnam v. Wise, supra*; and in contracts of this description, the true test seems to be, that wherever provision is made for dividing the specific products of the land, a tenancy in common results: *Putnam v. Wise, supra*, and authorities there cited.

The case of *Dulaney v. Dickerson*, 12 Ala. 601, to which we have been referred by the counsel for the defendant in error, is not in opposition to these views. The relation of landlord and tenant may exist, notwithstanding the foreman is, by the terms of the contract, to receive a portion of the crop in payment. If the tenant take an interest in the soil, it is a lease, by whatever words made, and the payment of a specific portion of the crop is then simply a payment of the rent in kind. In the case referred to, the contract is not set out, and the landlord had sued and obtained a judgment against the tenant for the rent. It was treated by all the parties as a lease, and no question was raised upon that point. The judge, the terms of the contract not being before the court, treated it, as the parties had done, as a question involving the relation of landlord and tenant only. It results from these views, that the plaintiff in error, with the other parties to the contract, were owners in common of the cotton.

The charge of the court, that the plaintiff below could not recover without joining the other owners as plaintiffs, was erroneous. The case of *Parminter v. Kelly*, 18 Ala. 716, decides that if a tenant in common of a chattel sell the entire property, it is a conversion, for which trover may be maintained by his co-tenant, and the law is now well settled that the sale by an officer of the entire property, in goods owned by two jointly, on an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*: *Waddell v. Cook*, 2 Hill (N. Y.), 49, note *a* [37 Am. Dec. 372], and cases there cited; and if the wrong-doer has sold it and received the money, the owner may waive the tort and bring *assumpsit* for the money: *Upchurch v. Norsworthy*, 15 Ala. 705; *Crow v. Boyd*, 17 Id. 51.

The judgment is reversed, and the cause remanded.

JOINDER OF CO-TENANTS AS PLAINTIFFS, NECESSITY of: See *Palmer v. Dougherty*, 54 Am. Dec. 636, and note.

TO ENABLE OWNER OF GOODS TO WAIVE TORT AND SUE IN ASSUMPSIT, where they have been wrongfully taken from him, the goods must have been converted into money: *Stearns v. Dillingham*, 54 Am. Dec. 88.

LEASING OF LAND ON SHARES, NATURE OF CONTRACT OF: See *Thompson v. Mawhinney*, 52 Am. Dec. 176; *McNeeley v. Hart*, 51 Id. 377.

OFFICER MAY SEIZE COMMON CHATTEL ON ATTACHMENT: See note to *Kimball v. Thompson*, 50 Am. Dec. 804.

LIABILITY OF OFFICER SELLING COMMON PROPERTY ON FIERI FACIAS AGAINST ONE OF TENANTS IN COMMON: See *Kimball v. Thompson*, 50 Am. Dec. 804.

POE v. DORRAH.

[20 ALABAMA, 288.]

INTEREST WHICH WILL RENDER WITNESS INCOMPETENT TO TESTIFY must be some legal, certain, immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability. If the interest be remote or contingent, and not certain and immediate, the witness is competent to testify, and such remote or contingent interest will go to his credibility, but not to his competency.

SHERIFF'S PAYMENT OF JUDGMENT RENDERED AGAINST HIM FOR NEGLECT to make the money will not operate as a payment of the original judgment unless the defendant in the execution insist upon such payment as a satisfaction, thus recognizing it as a payment made for his benefit and at his request.

SURETY ON FORFEITED FORTHCOMING BOND IS COMPETENT WITNESS in an action against the sheriff for neglect to make the money on an execution.

SECONDARY EVIDENCE OF CONTENTS OF EXECUTION IS ADMISSIBLE where it is proved that diligent search was made for it both by the clerk who is the keeper of the records and by the plaintiff's attorney; the presumption is that it was then lost, and this presumption continues until there is some evidence that it has been found since the search was made.

PLAINTIFF'S RELEASE OF LEVY ON PROPERTY CLAIMED BY THIRD PERSON, who interposes his claim to try the right of property, does not exempt the sheriff from neglect to make the execution out of property which in fact belongs to the plaintiff.

PROCEEDING to recover the amount of an execution from the sheriff Poe for his neglect to make the money on it. An attachment had issued in favor of Dorrah, in an action by him against Parkenson, and property had been levied on and replevied by giving a forthcoming bond with one Warbington as surety. An execution subsequently issued in the suit, and the forthcoming bond was returned forfeited. Warbington, against the defendant's objection, was introduced to fix the sheriff's liability; and the execution itself not having been offered in evidence, secondary evidence was offered of its contents against

the defendant's objection. The ground for this evidence is stated in the opinion. Land in the possession of Parkenson was levied on by the sheriff; but the levy was released by the plaintiff, she claiming it as her own; and it also appeared that the sheriff had levied an execution on personal property; but on its being claimed by a third person, who made an affidavit for the purpose of trying the right of property, the plaintiff released the levy. The sheriff prayed the court to instruct the jury that the effect of these releases was to discharge him; but the instruction was refused.

P. and J. L. Martin, for the plaintiff in error.

E. W. Peck, *contra*.

By Court, DARGAN, C. J. We will consider the questions raised in this case in the order in which they were made at the bar. First, was Warbington a competent witness for the plaintiff? The rule is now recognized by all courts professing to be governed by the common law, that the interest which will render a witness incompetent to testify must be some legal, certain, and immediate interest in the result of the suit itself, or in the record thereof, as an instrument of evidence to support his own claims, or to protect him from an admitted liability: 1 Greenl. Ev., sec. 386; *Moore v. Henderson*, 18 Ala. 232. If the interest be not of this character, but on the contrary, be remote or contingent, and not certain and immediate, the witness is competent to testify, and such remote or contingent interest will go to his credibility, but not to his competency. This general rule all admit, and it is in the application of it to particular cases that the conflict of opinion in the judgment of courts is to be found. This conflict, however, does not impair the rule, and we must test each and every case by it.

The facts of this case show that Warbington was liable to the plaintiff as the security of Parkenson for the same debt for which the sheriff is sought to be charged for his neglect. But the judgment that was recovered against the sheriff for his neglect to make the money on the execution against Parkenson, within itself could not operate as a satisfaction or discharge of the liability of the witness. Something else must be done besides the mere recovery. It must be paid, and the defendant in the execution, under our decisions, must insist upon such payment as a satisfaction, thus recognizing it as a payment made for his benefit and at his request: *Rutland v. Pippin*, 7

Ala. 469; *Roundtree v. Weaver*, 8 Id. 314; *Roundtree v. Holloway*, 13 Id. 357; *Mooney v. Parker*, 18 Id. 708. These authorities hold, that if a sheriff shall pay the amount of an execution, to discharge himself from liability for neglect in not making the money, the defendant may avail himself of such payment to have the judgment satisfied, but he thereby becomes liable to the sheriff for money paid for his use. Whether, then, the payment by the sheriff of the judgment against him, for his omission to make the money, would ever be a satisfaction of the judgment against the original defendant, does not depend exclusively upon the mere payment by the sheriff of the judgment against him, but upon the further fact whether the defendant in execution will so consider it, and thereby adopt it as his own; for if he does not, the judgment against him remaining unsatisfied may be enforced.

To this extent we have been driven by the decisions of our predecessors, and whether right or wrong, we must abide by the rule they have thus established. Perhaps it would have been better to have held that the payment by a sheriff to discharge himself from liability, for failing to make the money on an execution, could not be invoked by the defendant in the execution as a satisfaction of the judgment against him. But the law is settled otherwise. Admitting then that the defendant in execution may insist on such payment as a satisfaction, and thus render himself liable to the sheriff for money paid, will he do it? That is uncertain, it is contingent. Neither, therefore, the rendition of judgment against the sheriff, nor his subsequent payment of it, within themselves and without more, would discharge the witness from his liability; it requires another voluntary act to be done by the defendant in execution, which he may or may not do, at his election. Whether, therefore, the liability of the witness would ever be discharged by the proceedings against the sheriff depends on a contingency, and consequently he was legally competent to testify.

It may, however, be said that the witness himself might insist upon the payment made by the sheriff as a satisfaction of the judgment which he had become liable to pay by reason of the forfeiture of the bond on which he was security. To this we should answer, that if he could he would thereby adopt such payment as his own, and become immediately liable to the sheriff for money paid for his use. His interest, therefore, even in that point of view, would be balanced. We are not, however, to be understood as deciding that a security upon a forthcoming bond

can adopt the payment made by a sheriff in discharge of his liability for neglect, and thus have the judgment against the original defendant satisfied. All we intend to say is, if that could be allowed under the decisions we have referred to, he would be considered as adopting for his own benefit the payment by the sheriff, and therefore would be responsible to him for money paid. In no point of view can we see that the witness was incompetent from interest.

2. In regard to the admission of the secondary evidence of the contents of the execution, the court did not err. The execution was returned to the clerk's office before the search was made for it; and it was proved that diligent search was made for it, both by the clerk, who is the keeper of the records, and by the plaintiff's attorney. The presumption is that it was then lost, and of course this presumption would continue until there was some evidence that it had been found since the search was made. The cases of *Jones v. Scott*, 2 Ala. 59, and *Sturdevant v. Gains*, 5 Id. 435, show that the predicate for letting in the secondary proof was entirely sufficient.

3. In reference to the instructions prayed by the defendant, it is enough to say that they were properly rejected. A plaintiff in an execution surely has the right to order his own property to be released, if the sheriff levies upon it as the property of the defendant. Nor can this discharge the sheriff from his liability for neglect in not making the money out of property which in fact belongs to the defendant. Nor can the sheriff claim to be exempt from liability because the plaintiff releases a levy on property claimed by a third person, and who interposes his claim to try the right of property. The plaintiff may know the claim is just, or be unwilling to enter into a controversy about it. He has the right to release a levy so made, but the exercise of this right within itself can not absolve the sheriff from liability for his own neglect in not making the money, especially when the liability by the sheriff had been incurred long before such levy was made.

We can perceive no error in the record, and the judgment must be affirmed.

INTEREST, WHAT NECESSARY TO DISQUALIFY WITNESS: See *Masters v. Varner's Ex'r*, 50 Am. Dec. 114.

PAROL EVIDENCE OF LOST OR DESTROYED RECORD, ADMISSIBILITY OF: See *Eakin v. Vance*, 48 Am. Dec. 770, and note; see also *Lyon v. Bolling*, Id. 122, and note.

JUDGMENT CREDITOR'S REMEDY AGAINST SHERIFF FOR NOT LEVYING A F. FA. is not lost by his discharging the debtor from a *ca. sa.* issued at his instance, though such discharge may satisfy the judgment: *Hargrave v. Penrod*, 12 Am. Dec. 201.

HUDSON v. HUDSON.

[20 ALABAMA, 364.]

NO JUDGMENT CAN BE AMENDED OR ENTERED NUNC PRO TUNC unless amendment or entry be authorized by matter of record, or some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at least by some book belonging to the office of the court, and required to be kept there by law.

DECREE OF FINAL SETTLEMENT NUNC PRO TUNC IS NOT AUTHORIZED by a paper purporting to be a final decree, and signed by the probate judge, and found amongst the filed papers in the cause, where the record does not show that this paper was ever made a part of the record by the act of the court.

ERROR to the Tuscaloosa probate court. The opinion states the case.

Ormond and Nicolson, for the plaintiff in error.

P. and J. L. Martin, *contra*.

By Court, DARGAN, C. J. On the second Monday of August, 1850, Ann Hudson, by her guardian, F. P. Hale, moved the court of probate of Tuscaloosa county to enter a decree of final settlement of the estate of James Hudson deceased, against John and Nancy Hudson, administrator and administratrix of said estate, by which a sum of money was ascertained and awarded to her, and which should have been entered on the second Monday in April, 1847. In support of her motion she introduced the record of said cause, from which it appears that the plaintiffs in error were administrator and administratrix of said estate, and that previously to April, 1847, the estate was in progress of final settlement, and that the cause had been continued several terms previous thereto.

At the December term, 1846, the record shows that the cause was continued until the next term of said court; and this was the last entry that appeared upon the minutes of the court, or upon any book of record; but amongst the file of papers in the cause there appeared a paper, purporting to be a final decree made by Samuel D. J. Moore, who was judge of said court at the time the paper bears date, by which the amount in the hands of the administrators and the share thereof of each distributee was ascertained. This paper purports to be signed by the judge,

and on the back of it was the following indorsement: "Decree, estate of James Hudson; filed second Monday in April, 1847. S. D. J. Moore, Judge." It did not appear that this decree had ever been recorded or entered upon the minutes of the court, nor that any note or memorandum of any final decree had ever been made upon any book of the office. This was the only evidence introduced to show that a final decree had ever been made in the cause, and the question is, Was it sufficient to authorize the court to render the decree *nunc pro tunc*?

We think that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law. None of the decisions of this court go further than this, and to go one step further would, in our judgment, be productive of the most mischievous consequences: See *Thompson v. Miller*, 2 Stew. 470; *Moody v. Keener*, 9 Port. 252; *Brown v. Bartlett*, 2 Ala. 29; *Armstrong v. Robertson*, Id. 164. We must, therefore, ascertain if the paper purporting to be a final decree can be considered as part of the record. I will not undertake, at this time, to say what papers shall be considered before the final record is complete, and when the cause is progressing, or as it is said, *in fieri*. But I think I may say, that if the paper is not necessarily a paper in the cause, the custody of which belongs to the keeper of the records, and the record does not show that it was made so, that is, made part of the record by the act of the court, then it can not be considered a record or a part thereof.

If we try this paper by this test, we must reject it as record evidence. No part of the record shows that a final decree was ever rendered. This is shown alone by the paper itself. Nor does the record show that this paper was ever made part of the record by the act of the court, and clearly it is not a paper necessarily belonging to the cause, for there is no law requiring the probate judge to render his decrees in writing. He may orally pronounce his decrees, which will become the judgments of the court when transcribed on the minutes, or he may write them out and direct them to be transcribed; and possibly, if the record were to show that the decree had been rendered in writing, and the clerk directed to transcribe it, we might hold such a decree, so directed to be recorded, as record evidence. But a paper purporting to be a decree, and which is shown to be so

by no part of the record, can not be considered as part thereof. To hold that a paper, when not necessarily a part of the papers of the cause, could prove itself to be part of the record, in the absence of all other proof, would not only be an innovation upon the rules of evidence, but open a door to serious mischiefs.

Our conclusion is, that the instrument purporting to be a final settlement and decree can not be considered as part of the record, and consequently that the probate court erred in rendering the decree *nunc pro tunc*, for the reason that excluding this paper there is no evidence whatever that a final decree had ever been rendered.

Let the judgment be reversed.

DECREE NUNC PRO TUNC, WHEN AUTHORIZED: See *Metcalf v. Metcalf*, 54 Am. Dec. 190, and note.

AMENDMENT OF JUDGMENTS: See *Mills v. Lumpkin*, 44 Am. Dec. 677; *Smith v. Redus*, Id. 429, and the cases cited in the note.

RIDDLE v. BROWN.

[20 ALABAMA, 412.]

MINES ARE PART OF FREEHOLD, and *prima facie* the owner of the freehold has a right to the mines and the minerals underneath; but this is only a presumption of law that may be rebutted by showing a distinct title to the surface in one, and to that which is underneath in another.

THERE MAY BE RIGHT TO DIG ORE IN MINES OF ANOTHER as distinct from the ownership of the mines as that may be from the ownership of the surface.

RIGHT TO DIG ORE IN MINES OF ANOTHER, if it be to one and his heirs, is an incorporeal hereditament.

SALE OF RIGHT TO DIG ORE IN LANDS MUST BE IN WRITING in order to be binding.

LICENSE IS RIGHT TO DO PARTICULAR ACT or series of acts without any interest in the land.

LICENSE TO DIG ORE IN ANOTHER'S LAND will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it, but such a license is revocable at any time, at the pleasure of him who gives it, and is not assignable.

ONE WHO DIGS ORE ON ANOTHER'S LAND BECOMES TRESPASSER if, after the license is revoked, he attempts to enter, although he supposed he was maintaining his lawful right, and the owner will be justified in repelling him.

WHETHER BEATING ADMINISTERED IN REPELLING TRESPASS upon defendants was excessive and beyond what was necessary for the defense and maintenance of their possession is a matter purely for the jury to determine under all the facts and circumstances of the case.

IN ACTION FOR EXCESSIVE PERSONAL INJURIES inflicted by defendant in resisting the attempt of the plaintiff to dig ore from the defendant's mine, it is competent to prove that angry feelings had arisen between the parties in regard to their respective right to the possession of the ore bank previous to the beating, in order to show that the plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendant.

TRESPASS *vi et armis*. One Moore entered into a verbal agreement with John F. Atkinson, who acted as agent for his father, Stephen Atkinson, the owner of land, by which Moore was to have the right to dig ore from an ore bank situated on the land, for a thousand pounds of iron, to be delivered from time to time as Atkinson wanted it. Moore sold out his right to Riddle, the plaintiff. The ore bank was uninclosed at the time, but it was afterwards inclosed by Stephen Atkinson, who left a gate for the plaintiff to pass. John F., the day before the difficulty, warned the plaintiff not to go on the land, and forbade his wagoner to enter the inclosure. On the day of the difficulty, the defendants were gathered near where the plaintiff's wagon usually entered, when the plaintiff and others rode up, and after some conversation and quarreling, the plaintiff ordered his wagoner to take down the fence. On his attempting to do so a fight ensued, and the plaintiff was badly beaten. Verdict for the defendant; plaintiff brought error.

White and Parsons, for the plaintiff in error.

Rice and Morgan, *contra*.

By Court, PHELAN, J. It becomes necessary, in this case, to ascertain with some precision, in the first place, what interest or estate passed to Moore by the agreement entered into between him and defendant John F. Atkinson, by which the former was to have "the right to dig and carry away ore from the bank," in consideration of "one thousand pounds of iron, to be paid to the latter from time to time as he wanted it."

Mines are a part of the freehold, and *prima facie* the owner of the freehold has a right to the mines and minerals underneath; but this is only a presumption of law that may be rebutted by showing a distinct title to the surface in one, and to that which is underneath in another; for mines may form a distinct possession and different inheritances from the surface: 1 Crabb R. P. 93.

Again: there may be a right to dig ore in the mines of another as distinct from the ownership of the mines as that may

be from the ownership of the surface. This right to dig ore in the mines of another, if it be to one and his heirs, is an incorporeal hereditament: *Grubb v. Guilford*, 4 Watts, 223 [28 Am. Dec. 700]. It is a permanent interest in the land of another, to which a legal title can only pass by deed, and of which no sale can be made which is binding, unless reduced to writing, agreeably to the statute of frauds: *Hays v. Richardson*, 1 Gill & J. 366; *Cook v. Stearns*, 11 Mass. 533.

Had the contract between Moore and defendant Atkinson been reduced to writing, and by deed, it would have created in Moore, I apprehend, by force of our statute, a fee simple in this easement; this "right to dig ore." An estate to him, where no less estate was expressly limited, would have been an estate to him and his heirs: See statute, Clay's Dig., 156. But to give to it such an effect, it was indispensable that it should have been in writing. A verbal contract for an easement like this would have no more binding force in law, under the statute of frauds, than if it had been simply for the land itself.

But if it be devoid of efficacy as a contract of sale, because not reduced to writing, is it therefore void for all purposes? Not altogether. It may still serve the purpose of a license. And what is the extent to which it can go as such? A license merely—a verbal license—is the right to do a particular act, or a series of acts, without any interest in the land. Such a license will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it: *Doe v. Wood*, 2 Barn. & Ald. 724; 1 Crabb R. P. 96. But such a license is revocable at any time, at the pleasure of him who gives it. We do not mean that all verbal licenses are revocable at pleasure; there are distinctions to be observed; but only such a license as that we are now considering: *Cook v. Stearns*, 11 Mass. 533; *Thompson v. Gregory*, 4 Johns. 81 [4 Am. Dec. 255]; 1 Crabb R. P. 425.

Such a license, moreover, is not assignable; the privilege it confers is personal to him to whom it is given. The conveyance of the land to another would be a revocation of such a license: *Wallis v. Harrison*, 4 Mee. & W. 538.

Having ascertained the principles by which we can determine between the conflicting claims of the plaintiff to enter the inclosure, and of the defendants to repel him from effecting such entrance, we will now proceed to consider that question.

The license given to Moore, and the digging and carrying away ore for years under it, would not have given to him even,

much less to the plaintiff, the possession of the ore bank as against the owner. The possession remained during all the time, with the legal title in defendant Atkinson, and this was even more emphatically true of the inclosure in which it was situated, in which defendants had a crop growing at the time. The idea of an adverse possession either in Moore, or Riddle, to whom he sold, upon which the counsel for plaintiff seemed somewhat to rely, has no just foundation. The possession of the inclosure was with all the defendants at the time, with the defendant John F. Atkinson as owner, and with the other defendants as his copartners in cultivating the same.

No license to enter on that possession existed in the plaintiff at the time of the affair. The license that had been given was personal to Moore, and could not be transferred to the plaintiff. But such a license was revocable at pleasure, and if the right to enter had been claimed by Moore himself, instead of plaintiff, it was sufficiently revoked by the notice to the wagoner the day before, and at all events by the warning to the plaintiff not to enter at the time of the difficulty. He persisted, however, supposing, no doubt, that he was only maintaining his lawful right. In this he was mistaken. It behooves a man to proceed with great precaution when he determines to vindicate a supposed possession against another who is in or on the premises. As must appear from the principles already stated, the possession, and the right in law to defend and maintain that possession against all the world, was with the defendants. It follows that plaintiff, in making the attempt he did to enter the inclosure, was himself a trespasser, and that defendants were justified in repelling his attempt.

These views sufficiently indicate that we find no error either in the charges given by the court or in the refusal to charge as plaintiff requested.

The next assignment of error relates to the admissibility of the evidence showing that plaintiff, after alluding to certain threats of the defendants, had spoken in a very contemptuous manner of the defendant John F. Atkinson, and had made threats of what he would or could do with him in certain contingencies, before the beating took place, although the witness stated that he had not told the defendant of this until some time afterwards.

One point made in the case of the plaintiff in the trial below, as appears from the record, was, that admitting the lawfulness of defendants' possession, the beating was excessive and beyond

what was necessary for the defense and maintenance of their possession; and that defendants were guilty of a trespass on that ground. I must say that the facts contained in the record show a case of severe, and it seems to me unnecessary, infliction of personal injury upon the plaintiff; but this was a matter purely for the jury to determine, under all the facts and circumstances of the case, to whom the court properly left it.

We see no good objection to the evidence admitted, at least to a portion of it, and the objection was general

It was competent to show that angry feelings had arisen between these parties in regard to their respective rights to the possession of the ore bank, previous to the beating, in order to show that plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendants.

There is no error in the record, and the judgment below is affirmed.

LICENSE IS BARE AUTHORITY TO DO CERTAIN ACTS, or series of acts, upon another's land without possessing any estate therein: *Hazelton v. Putnam*, 54 Am. Dec. 158.

LICENSE IS NOT ASSIGNABLE: *Hazelton v. Putnam*, 54 Am. Dec. 158

LICENSE, WHEN AND HOW REVOCABLE: See the cases cited in the note to *Hazelton v. Putnam*, 54 Am. Dec. 158.

PAROL LICENSE TO WORK MINING LANDS, AND REVOCATION OF: See *Bush v. Sullivan*, 54 Am. Dec. 506.

ASSAULT TO PREVENT TRESPASS, WHEN AND WHEN NOT JUSTIFIABLE: See *Scribner v. Beach*, 47 Am. Dec. 265; see also *Hall v. Power*, 46 Id. 698; *Johnson v. Patterson*, 35 Id. 96; *Loomis v. Terry*, 31 Id. 306; *Shain v. Markham*, 20 Id. 232; *Bobb v. Bosworth*, 12 Id. 273; *Watrous v. Steel*, 24 Id. 648.

WEATHERFORD v. WEATHERFORD.

[20 ALABAMA, 548.]

BURDEN OF PROOF IS ON PERSON CLAIMING TO BE LEGITIMATE SON of a decedent.

FILIATION IS ESTABLISHED by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong.

IF FILIATION IS ESTABLISHED, LAW RAISES PRESUMPTION OF LEGITIMACY, and the burden of proof is shifted on those asserting his illegitimacy.

EVIDENCE PROVES FILIATION, BUT DISPROVES LEGITIMACY OF CHILD, when it shows that, after the death of the father, his wife took the complainant and educated him and reared him in her own family, but further

shows that although the child was treated as a member of the family, he was never regarded as legitimate by her or her children.

PRESUMPTION OF ACTUAL MARRIAGE FROM COHABITATION IS REBUTTED by the fact of a subsequent permanent separation without any apparent cause, and the marriage in solemn form of one of the parties which took place shortly after the separation.

BILL by William Weatherford, who claimed to be the lawful son and heir of the late William Weatherford, sen., alleging that the decedent and the complainant's mother, Superlamy, were lawfully married by the custom of the Creek tribes, among which they lived; that complainant had been recognized as his lawful son by Weatherford, sen.; that subsequently Weatherford, sen., and one Mary Stiggins lived in a state of concubinage and had several children; and that Mary Stiggins, after the death of decedent, sent for complainant, brought him to her house, acknowledged him as the decedent's lawful son, and that he had always been regarded and treated as such by the family and by the neighborhood. The administrator of Weatherford and his children are made defendants. Other evidence is stated in the opinion. The chancellor dismissed the bill. The complainant brought error.

Campbell, for the plaintiff in error.

Hopkins and Percy Walker, contra.

By Court, CHILTON, J. Many interesting and some novel points have been elaborately and ably discussed by the counsel in the argument of this case; but the view which we feel constrained to take of it, from the proof in the record, renders it unnecessary to go into their examination.

The complainant claims to be the legitimate son and sole heir of William Weatherford, deceased, and as such entitled to his whole estate. Upon this allegation, that is, upon his legitimacy, his title depends.

The answers which are responsive to the bill explicitly deny that the said William Weatherford was ever married to the complainant's mother, and they further deny the existence of the main facts charged in the bill, tending to establish the filiation of the complainant.

The burden of substantiating his averments by such proof as, under the rules of chancery practice, will authorize the court in pronouncing for the complainant is thus cast upon him.

The evidence relied upon to establish the complainant's legitimacy may be considered under the following heads: 1. Facts

tending to establish filiation; 2. Reputation and cohabitation of his father and mother as man and wife; 3. Proof tending directly to establish a marriage between his parents, according to the custom of the Creek Indian tribe, to which they belonged.

We agree with the learned counsel of the complainant that the doctrine as laid down in the code Napoleon, tit. 7, sec. 32, respecting the evidence of filiation, is equally the doctrine of the common law: that "the enjoyment of this condition is established by a satisfactory combination of facts, indicating the connection of parent and child between an individual and the family to which he claims to belong." The principal of these facts are said to be that the individual has always borne the name of his father, to whom he claims to belong; that the father has treated him as his child, and in that character has provided for his education, his maintenance, and his establishment; that he has been uniformly received as such in society, and that he has been acknowledged as such by the family.

We may further concede the proposition insisted on for the complainant, that if there be sufficient proof to establish filiation, the law raises the presumption of his legitimacy, thus shifting the burden of proof on those asserting his illegitimacy.

Upon narrowly scanning the proof, however, we are unable to discover any evidence of filiation sufficient to countervail the force of the positive denials of the answers, especially when we consider it in connection with the opposing testimony.

It may be proper to observe, that in considering the evidence, we should not entirely exclude from our view the fact that William Weatherford was a person of much notoriety as a military chieftain and leader of his tribe, and that serving in that capacity during the most of the time when it is alleged he cohabited with Superlamy, the mother of the complainant, it is fair to presume that the impression as to whether his connection with her was lawful or illicit would have been very general, and that the proof of the connection, being licit, would be more readily obtained than if such connection had existed between less notorious persons.

It is not shown that William Weatherford, the elder, ever saw the complainant. On the contrary, it is proved that Superlamy left her residence in Baldwin county while she was pregnant with the complainant, and never returned; and that the complainant was brought by a relative to the residence of Mary Weatherford, formerly Mary Stiggins, after the death of his mother, and subsequently to the death of said Weatherford; so

that the record totally fails to furnish any evidence of filiation, arising from the treatment or recognition of the complainant by William Weatherford, sen.

The proof also sufficiently establishes that Mary Stiggins, *alias* Weatherford, raised complainant and sent him to school, and said to several witnesses that he was the son of William Weatherford; also, that her children by Weatherford called him "brother," and treated him as a half-brother. But the proof, coupled with the answers, clearly preponderates to establish the position, that neither she nor her children ever recognized him as the legitimate offspring of said deceased. Lucretia Sizemore says Mary Weatherford did not recognize him as a legitimate son of William Weatherford. Susan Sizemore says he was not regarded as an heir. William Sizemore says Mrs. Mary Weatherford did not own him as a lawful son, and that while her children recognized him as a brother, they did not regard him as one of the heirs.

These witnesses were examined by the complainant, and the only proof to show that he was regarded otherwise than as illegitimate by the family is made by Samuel and Lucretia Edmunds, and they only prove that he was regarded in the family as William Weatherford's son, without stating whether as his legitimate or illegitimate son.

We come therefore to the conclusion that the proof of filiation is not sufficient, or rather is of that character which, while it proves filiation, disproves legitimacy, and is not sufficient to shift the *onus* of proof by raising a presumption of legitimacy.

The fact that the complainant was residing in the family of the late William Weatherford up to and at the time of the division of the property, as proved by W. C. White, that he was then of lawful age, and interposed no objection to the division which was made by order of court, and which proceeded upon the ground of his illegitimacy and consequent inability to take as heir or distributee, is another circumstance going to corroborate the conclusion that, while his paternity was acknowledged, he was not regarded as the issue of lawful wedlock.

When we come to the proof of reputation and the cohabitation of the complainant's mother and father, we think the decided weight of evidence is against the complainant.

It would unnecessarily swell this opinion to copy the evidence afforded by the depositions of the several witnesses upon this head. Samuel and Lucretia Edmunds and Susan Sizemore state that they (Weatherford and Superlamy) were repated to be man

and wife in the neighborhood in which they lived; whereas, on the other hand, William Sizemore, Lucretia Sizemore, Gilbert C. Russell, and William Hollinger prove that the connection was reputed to be illicit. Elizabeth Moniac proves that Weatherford "took up" with this woman at the "Holy Ground," where the Indians were generally assembled after the massacre at Fort Mims during the war, and that complainant was always reputed to be a bastard. This proof fails to show that complainant's claim to legitimacy, as deducible from reputation, can be sustained.

There is no proof of actual marriage according to the Indian customs; and the presumption of an actual marriage from the fact of cohabitation is rebutted by the fact of a subsequent permanent separation without any apparent cause, and the marriage in solemn form of Weatherford to Mary Stiggins, which took place shortly after the separation: See *Senser v. Bower*, 1 Pen. & W. 452; *Jackson v. Claw*, 18 Johns. 346.

Without, however, commenting more at large upon the testimony, we are fully satisfied that the whole proof entirely fails to establish the relation of man and wife between Weatherford and Superlamy, and consequently fails to sustain the claim of the complainant, which is dependent upon proof of that relation.

This view accords with the conclusion attained by the chancellor, and his decree must be consequently affirmed.

DARGAN, C. J., not sitting.

AFFILIATION, WHAT IS.—Affiliation, commonly called filiation in its broad sense, is the establishment of the paternity of a child. Abbott says of it that it is "parentage; the relation or tie between a child and its parents. Also, the ascertaining of parentage; the assignment of a child to its parent. The term is almost always used of the relation between the child and its father; but this seems rather because there is seldom any need to use it of maternity, than because the meaning of the word does not include the mother:" Abbott's Law Dict., tit. Filiation. The ordinary use of the word is to signify the fixing of any one with the paternity of a bastard child, and the obligation to maintain it. It has been so defined by law lexicographers: Whart. Law Lex., tit. Affiliation; Rapalje and Lawrence's Law Dict., tit. Affiliation. The question of the paternity of a child often arises in determining the legitimacy of children born in lawful wedlock, and much more frequently in charging one with being the father of a bastard, and causing him to provide for its maintenance. Proceedings to establish the affiliation of a bastard child and to provide for its support are entirely statutory, they being entirely unknown at the common law. We will treat first of the legitimacy of children born in wedlock, and then of the proceedings for the affiliation of bastards under the various state statutes.

CHILDREN BORN DURING WEDLOCK, LEGITIMACY OF.—There is no pre-

sumption of the law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate. In the early days of the common law, this presumption was carried so far that if the father was within the four seas, a child could not be a bastard; but this extreme theory has long since been exploded, and the presumption is now held to be strong but rebuttable. In *Hargrave v. Hargrave*, 9 Beav. 552, it was said that this presumption would not be rebutted by circumstances which created only doubt and suspicion, but it would be wholly removed by showing that the husband was—1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication whatever with the mother; 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten; and, 4. Present only during such circumstances as afforded clear and satisfactory proof that there was no sexual intercourse. And *Shuler v. Bull*, 13 Rep., N. S., 156, held that while the principle expressed in the maxim, *Pater est quem nuptie demonstrant*, was entitled to great influence, yet the question of the paternity of a child born in wedlock was one of fact, to be determined upon competent evidence. The evidence, however, must be strong, distinct, clear, and satisfactory: *Hargrave v. Hargrave*, 9 Beav. 552; *Plowes v. Bossey*, 8 Jur., N. S., 352; *Vernon v. Vernon*, 6 La. Ann. 243. The *onus probandi* lies entirely on the part of those who wish to show the illegitimacy: *Plowes v. Bossey*, *supra*. Neither husband nor wife is competent to testify to non-access, or for the purpose of bastardizing the issue: *Rex v. Kea*, 11 East, 132; *Legge v. Edmonds*, 25 L. J. Ch. 125; *Goodright d. Stevens v. Moss*, 2 Cowp. 591; *Vernon v. Vernon*, 6 La. Ann. 243; *Tioga Co. v. South Creek Township*, 75 Pa. St. 433; *Anon. v. Anon.*, 22 Beav. 431; *Parker v. Way*, 15 N. H. 45; *Commonwealth v. Shepherd*, 6 Binn. 283; *Cope v. Cope*, 5 Car. & P. 604. A wife can not give evidence of the non-access of the husband, although he is dead at the time of her examination as a witness: *Rex v. Kea*, *supra*; *Goodright d. Stevens v. Moss*, *supra*. If the husband had access to the wife, no evidence short of his absolute impotence would bastardize the issue: *Commonwealth v. Shepherd*, 6 Binn. 283; and the same is true where they live together: *Legge v. Edmonds*, 25 L. J. Ch. 125; *Commonwealth v. Wentz*, 1 Ashm. 269. And where the husband's physical incapacity is satisfactorily made out according to the opinions of medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child, because if she is of irreproachable character it would go far to modify the opinion as to the husband's incapacity: *Id.* Where a child's mother was an Indian, proof that the child was a colored child will not be sufficient to overcome the presumption of his legitimacy, as the color will be referred to that derived from his mother: *Ill. Land and Loan Co. v. Bonner*, 75 Ill. 315; and proof that the parents emigrated to Texas and lived together as man and wife is sufficient to establish the heirship of the children of the parties: *Kaise v. Lawson*, 38 Tex. 160. If the jury are satisfied that intercourse took place between the husband and wife at such times as, in the course of nature, to account for the birth of the child, the child must be taken to be his, although during the same period other men may have had intercourse with the mother: *Wright v. Houldgate*, 3 Car. & K. 158. Where the husband and wife live apart, non-access of the husband may be shown from the facts and circumstances: *Commonwealth v. Wentz*, 1 Ashm. 269; and the question of legitimacy may be decided on a consideration of all the circumstances: *Commonwealth v. Shepherd*, 6 Binn. 283. The fact that they had access is not conclusive of the legitimacy: *Reg. v. Mansfield*, 1 Q. B. 444;

if the wife was notoriously living in adultery, a child born would be illegitimate, even though the husband had access: *Cope v. Cope*, 5 Car. & P. 604; and to the same effect is *Sibbet v. Ainsley*, 3 L. T., N. S., 583; although in *Morris v. Davis*, 5 Cl. & Fin. 163, it was held that if access be proved, no inquiry could be made whether the husband or any other person was the parent; see also *Hargrave v. Hargrave*, 9 Beav. 552; but in *Morris v. Davis*, it was said that the legitimacy of a child born during separation, where the husband lived within such a distance as to afford an opportunity of sexual intercourse, would be disproved, not only by evidence showing that he did not have sexual intercourse with her, but also by evidence of their acts and conduct, such as that the wife was living in adultery; that she concealed the birth of the child from her husband, and declared to him that she never had such a child; that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence; and also that the wife's paramour aided in concealing the child, reared it, educated it as his own, and left it all his property by his will. If there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the husband's: *Reg. v. Mansfield*, 1 Q. B. 444. Evidence of non-intercourse for more than a year, continued to within five months of the birth of a child, is sufficient to establish its illegitimacy: *Dean v. State*, 29 Ind. 483. Non-access need not be proved during the whole period of the wife's pregnancy; it would be sufficient if all the circumstances of the case show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth: *Rex v. Luff*, 8 East, 193. If a husband is found to have gone beyond seas above two years before the birth of a child born to his wife, she remaining at home, the conclusion is irresistible that such child is a bastard: *Rex v. Maidstone*, 12 Id. 550. So also illegitimacy of the child is established beyond all dispute by evidence that she was living in adultery at a time when the child was begotten, and of her husband's then residing in another part of the kingdom, so as to make access impossible: *Saye and Sele* (Barony), 1 H. L. Cas. 507; and where the husband, after a long absence, did not rejoin his wife until after November 24, 1849, and she, nevertheless, produced a full-grown child on the eighteenth of May, 1850, it was held he could not have been the father: *Heathcote's Divorce Bill*, 1 Macq. 277.

✓ PROCEEDINGS FOR AFFILIATION UNDER VARIOUS STATE STATUTES.—a. *Nature of Proceedings, whether Civil or Criminal.* There is some difference of opinion as to whether a proceeding under the bastardy act for the affiliation of a bastard child is civil or criminal; but an overwhelming weight of authority establishes the proposition that such proceedings are civil: *Hinman v. Taylor*, 2 Conn. 357; *Mann v. People*, 37 Ill. 467; *Maloney v. People*, 38 Id. 62; *Pease v. Hubbard*, 37 Id. 259; *Allison v. People*, 45 Id. 37; *People v. Starr*, 50 Id. 52; *People v. Christman*, 66 Id. 162; *McCoy v. People*, 71 Id. 111; *Lewis v. People*, 82 Id. 104; *State v. Evans*, 19 Ind. 92; *Byers v. State*, 20 Id. 47; *Alley v. State*, 76 Id. 94; *Burt v. State*, 79 Id. 359, 361; *De Priest v. State*, 68 Id. 569; *State v. Pratt*, 40 Iowa, 631, 634; *Scantland v. Commonwealth*, 6 J. J. Marsh. 585; *Burgen v. Strangham*, 7 Id. 583; *Chandler v. Commonwealth*, 4 Metc. (Ky.) 66; *Commonwealth v. Turner*, 4 Dana, 511; *Francis v. Commonwealth*, 3 Bush, 4; *Schooler v. Commonwealth*, Litt. Sel. Cas. 88; *Mahoney v. Crowley*, 36 Me. 486; *Smith v. Lind*, 37 Id. 546; *Bailey v. Chelsea*, 10 Cush. 284; *Chapel v. White*, 3 Id. 537; *Hawes v. Gustin*, 2 Allen, 402; *Wilbur v. Crane*, 13 Pick. 284; *People v. Cantine*, 1 Mich. N. P. 140; *People Hartly*, 13 N. W. Rep. 829 (Mich.); *State v. Nichols*, 13 N. W. Rep. 153

(Minn.); *Cottrell v. State*, 9 Neb. 125; *Stokes v. Sanborn*, 45 N. H. 274; *Mars-ton v. Jenness*, 11 Id. 156; *Little v. Dickinson*, 29 Id. 56; *Ward v. Bell*, 7 Jones L. 79; *State v. Pate*, Busb. L. 244; *State v. Bryan*, 83 N. C. 611; *State v. Wilkie*, 85 Id. 513; *State v. Crouse*, 86 Id. 617; *State v. Hickerson*, 72 Id. 421; *Stovall v. State*, 9 Baxt. 597; *Blood v. Morrill*, 17 Vt. 598. Some cases have held these proceedings to be in the nature of a criminal prosecution: *Jackson v. State*, 29 Ark. 62; or as quasi criminal: *Smith v. State*, 1 Houst. C. C. 107; *State v. Mushied*, 12 Wis. 561; *Van Tassel v. State*, 18 N. W. Rep. 328; *Devinney v. State*, Wright, 564; and in Vermont: *Robinson v. Dana*, 16 Vt. 474; Illinois: *Kelly v. People*, 29 Ill. 287; Massachusetts: *Hill v. Wells*, 6 Pick. 104; *Cummings v. Hodydon*, 13 Met. 246; *Hyde v. Chapin*, 2 Cush. 77; S. C., 6 Id. 66—they have been held criminal; but that this rule no longer prevails in those states can be seen by reference to later cases from the same states cited above. These proceedings were held to be special, and not strictly criminal, in *Semon v. People*, 42 Mich. 141; and in *People v. Phalen*, 13 N. W. Rep. 830 (Mich.), it was said that they were not criminal, in a proper sense of the word; that they were not strictly civil or criminal in their nature; that they partake somewhat of the character of both, but in so far as their aim is to protect the public by providing for the support of the child they were quasi criminal. In *Baker v. State*, 14 N. W. Rep. 718 (Wis.), they were regarded as neither civil nor criminal, but as *sui generis*. In *Ex parte Cottrell*, 13 Id. 174 (Neb.), the court said that a proceeding in bastardy, while in its nature civil, is properly a police regulation, requiring the plaintiff to furnish support for his child and to indemnify the public against liability for its support.

b. *Who can Maintain Complaint under Bastardy Acts, and Who Chargeable.*—The statutes of the various states are so specific as to who may prosecute a complaint in bastardy, that not much room has been left for judicial decision. In some states the mother must be a single woman: *Williams v. State*, 29 Ala. 9; *Andrew v. Cotherine*, 16 Fla. 830; *Haworth v. Gill*, 30 Ohio St. 627; *Devinney v. State*, Wright, 564; this was formerly so in Indiana: *Smith v. State*, 4 Blackf. 188; but the law has been changed by statute: *Cuppy v. State*, 24 Ind. 389; and other states have allowed a complaint to be prosecuted for a child begotten on the body of a married woman: *Sullivan v. Kelly*, 3 Allen, 148; *Parker v. Way*, 15 N. H. 45; *State v. Overseers*, 24 N. J. L. 533; *State v. Pettaway*, 3 Hawks, 623; *Wilkie v. West*, 1 Murph. 319; *State v. Allison*, Phill. L. 346. In Vermont, a married woman formerly could not maintain a complaint: *Gaffery v. Austin*, 8 Vt. 70; but in *Sisco v. Harmon*, 9 Id. 129, it was held that the overseers of the poor might sustain a complaint, although the mother, after the birth of the child, was a married woman, the husband joining with the wife in the written request and prayer for a warrant. And married women have been allowed to make the complaint, although the statute mentions single women only: *Wilkie v. West*, 1 Murph. 319; *Reg. v. Pilkington*, 2 El. & Bl. 546; *Ex parte Grimes*, 22 L. J. M. C. 153; *Queen v. Collingwood*, 12 Q. B. 681; but non-access of the husband must be shown: *State v. Pettaway*, 3 Hawkes, 623; *State v. Overseers*, 24 N. J. L. 533; *Reg. v. Pilkington*, *supra*; *Ex parte Grimes*, *supra*; *Queen v. Collingwood*, *supra*. It is not necessary for the husband to join in the complaint: *Sullivan v. Kelly*, 3 Allen, 148; *contra*: *Wilbur v. Crane*, 13 Pick. 284; and see *Cheesborough v. Baldwin*, 1 Root, 229. In North Carolina, if the mother is brought before a magistrate, and refuses to declare on oath the father of the child, but pays the fine and gives bond and security to indemnify the county, she can not afterwards voluntarily institute proceedings

against the reputed father: *State v. Brown*, 1 Jones L. 129; *State v. Price*, 81 N. C. 516. In Kentucky, formerly, the proceedings were not authorized where all the parties were slaves at the time of the birth: *Lewis v. Commonwealth*, 3 Bush, 539; although a free woman of color could make a complaint: *Williams v. Blincoe*, 5 Litt. 171. But since the abolition of slavery, an unmarried negro woman may make the necessary affidavit: *Francis v. Commonwealth*, 3 Bush, 4; and in Georgia the distinction in this respect between negro women and white women has been abolished: *Allen v. Harris*, 40 Ga. 220; although formerly it was recognized: *Smith v. State*, 28 Id. 19. If the mother is an infant, it is not necessary that she appear by guardian or next friend: *Hanna v. State*, 60 Ala. 100; *McCall v. Parker*, 13 Met. 372; S. C., 46 Am. Dec. 735; *Low v. Mitchell*, 18 Me. 372; but, *contra*: *Hinman v. Taylor*, 2 Conn. 357. The fact that the father is an infant does not relieve him from liability, but a guardian *ad litem* should be appointed: *Chandler v. Commonwealth*, 4 Metc. (Ky.) 66; although in *Evans v. State*, 58 Ind. 587, it was held that the failure of the court to appoint a guardian *ad litem* was not a cause for a new trial.

c. *Complaint or Indictment, Allegations in, Sufficiency of, etc.*—The statutes provide, generally, that the prosecution shall be in the name of the state. And it would not be proper to join the mother with the state in a proceeding to fix the paternity: *State v. Collins*, 85 N. C. 511. In Vermont, it is indispensable that the complaint be in writing: *State v. Simons*, 30 Vt. 620; and signed and sworn to, but the complaint need not so state: *Groves v. Adams*, 8 Id. 130. A supplemental complaint in the superior court need not be sworn to in Massachusetts: *Sabin v. Jones*, 119 Mass. 167. The complaint is sufficient if it inform the defendant of the nature of the cause of action, and is so explicit that judgment thereon could be used as a bar to another prosecution for the same cause: *De Priest v. State*, 68 Ind. 569. Thus a complaint duly verified as follows: "E. B. complains of J. D., and says that she is pregnant with a child, which, if born alive, will be a bastard, and that said J. D. is the father of said bastard child," is sufficient: *Dibble v. State*, 48 Id. 470; and see *Burt v. Ayres*, 116 Mass. 263, for further illustration. The complaint need not state where the mother resides: *Beeman v. State*, 5 Blackf. 165; *State v. Demoss*, 4 Ind. 189; *Neff v. State*, 3 Id. 564; *Zweifel v. State*, 27 Wis. 396; nor at what time and place the child was begotten; nor that the complainant and defendant were not married at the time of the alleged conception nor at the commencement of the action, that being sufficiently implied in the statement that the child, "if born alive, will be a bastard:" *Zweifel v. State*, *supra*; and a failure to state the sex of the child is no ground for reversal: *Richmond v. State*, 19 Id. 307; but the proceedings will be quashed in Tennessee if they do not show that the child is likely to become a county charge: *State v. Jameson*, 3 Heisk. 108; and an indictment alleging that the defendant was the "father" of the child was held bad: *State v. Caspary*, 11 Rich. 356. Particularity in setting forth the time and place of the act causing the pregnancy is not necessary. Thus where the complaint set forth that the child was begotten on the fifteenth day of May last, and was not dated, but was sworn to on the thirteenth day of January, A. D. 1840, it was held sufficient: *Marston v. Jenness*, 12 N. H. 137. And where the declaration states the time as between two dates, the jury are authorized to find the defendant guilty on sufficient proof, although the child was begotten outside of the dates mentioned: *Holbrook v. Knight*, 67 Me. 244; and a complaint made March 20, 1880, is not invalidated by uncertainty as to whether the pregnancy was caused September 15, October 1, or 15, 1879:

Hamilton v. People, 46 Mich. 186; S. C., 9 N. W. Rep. 247; and a difference between the examination of a complainant by the magistrate and her subsequent complaint, in stating the time of the begetting, is not a fatal defect in the process: *Sales v. Fanning*, 13 Gray, 538. It was held in *Hull v. People*, 2 N. W. Rep. 175, that if the complaint set out with particularity the time, place, and circumstances of the connection causing the pregnancy, it was error to permit the prosecutrix, on the trial, to show that such connection occurred at another time and place: *Hull v. People*, 41 Mich. 167; S. C., 2 N. W. Rep. 175. The contrary was held in *Kennedy v. Shea*, 110 Mass. 152; and in *Bassett v. Abbott*, 4 Gray, 69, it was held that such a complaint was supported by evidence that the parties had intercourse at the time and place named, and also at another time and place, and that the child was begotten by one of these acts of intercourse, if the complainant does not know at which of these times the child was begotten. A complaint in a suit by a town averring that the mother at all times neglected and omitted to bring forward, in her own name, and prosecute to final judgment, her suit for the maintenance of the child, is a sufficient averment of her neglect: *Fuller v. Hampton*, 5 Conn. 416; *Chaplin v. Hartshorne*, 6 Id. 42. Where the defendant is charged to be the father of two children, whilst it would have been better practice to have indicted him for two distinct offenses, and punished him, upon conviction, for each offense separately, yet the fact that he was charged with but one offense in being the father of two children is no ground of acquittal: *Davis v. State*, 58 Ga. 170. Two indictments might be sustained against the father of two bastard children born at one birth, but the indictment and the recognizance should describe each child by name, complexion, hair, and sex, or by some means so as to identify them: *State v. Derrick*, 1 McMull. 338.

d. *Place where Complaint to be Made, and how Affected by Place of Birth, Residence, or Settlement.*—The proceedings for the affiliation of a bastard and to compel aid from its father for its support are in their nature confined to causes arising within the state; they are altogether a matter of internal police, and in their very nature exclusively local: *Graham v. Monsergh*, 22 Vt. 543; consequently the statute does not apply to a case where the child lives out of the state, even though begotten in the state: *Sutfin v. People*, 43 Mich. 37; S. C., 4 N. W. Rep. 509, or where it is born out of the jurisdiction and its mother has no domicile within the jurisdiction: *Id.*; *Egleson v. Battles*, 26 Vt. 548; *Grant v. Barry*, 9 Allen, 459; *Reg. v. Blane*, 3 New Sess. Cas. 597; but if the mother, at the time of the birth, is a *bona fide* resident of the state, and the birth of the child, by accident or during a temporary absence, occurs out of the state, the mother is entitled to her remedy under the statute: *Egleson v. Battles*, *supra*; and in Wisconsin the father of an illegitimate child begotten within but born without that state is liable for its support: *Duffies v. State*, 7 Wis. 672. The statute in Illinois is not limited to residents of a state, and there a non-resident female may prosecute a complaint: *Kolbe v. People*, 85 Ill. 336. In Rhode Island if the mother has no legal settlement, the complaint may be brought by the overseers of the poor: *State v. Hussey*, 12 R. I. 477. A complaint in Massachusetts may be maintained if the child is born there and both the parents reside there at its birth, although it was begotten in Canada, and both the parents then resided there: *McFadden v. Frye*, 13 Allen, 472. In some of the states the complaint may be prosecuted in the place where the mother has her settlement: *Allen v. Ford*, 11 Vt. 367; *State v. Roberts*, 10 Ired. L. 350; *State v. Jenkins*, 12 Id. 121; *State v. Elam*, Phill. L. 460. In Indiana, the complaint must be commenced in the place

of the defendant's residence, if he is a resident: *Hawley v. State*, 69 Ind. 98. In other states, the place of the child's birth determines where the complaint must be brought: *Dally v. Overseers*, 21 N. J. L. 491; *Hawkins v. State*, Id. 630; *Edmonds v. State*, 5 Humph. 94; *People v. Harty*, 13 N. W. Rep. 829 (Mich.); and in Georgia it was held an indictment would not lie in one county when the child was begotten and born in another: *Huff v. State*, 29 Ga. 424. But in Indiana it was said that any unmarried woman residing in this state might make a complaint without regard to the place where the child was born: *Cooper v. State*, 4 Blackf. 316.

e. *Evidence in Proceedings for Affiliation*.—By far the greater number of cases has arisen under this branch of the subject, and the questions involved in it are not of so statutory a character as those falling under the other heads. For convenience of reference the cases will be classified, and we will treat—

(1.) *Of Competency of Complainant or Defendant as Witness*.—The rule is well settled that the mother is a competent witness in a prosecution for bastardy: *Rez v. Bramley*, 6 T. R. 330; *United States v. Collins*, 1 Cranch C. Ct. 592; *Satterwhite v. State*, 32 Ala. 578; *Booth v. Hart*, 43 Conn. 480; *State v. Han*, 23 Ind. 539; *Dean v. State*, 29 Id. 483; *Earp v. Commonwealth*, 9 Dana, 301; *Murphy v. Spence*, 9 Gray, 399; *Savage v. Reardon*, 11 Id. 376; *Hyde v. Chapin*, 2 Cush. 77; *Connelly v. Burrill*, 10 Id. 492; *Reed v. Haskins*, 116 Mass. 198; *State v. Henderson*, Phill. L. 229; *Warlick v. White*, 76 N. C. 175; *Commonwealth v. Wentz*, 1 Ashm. 269; *State v. Ingram*, 4 Hayw. 221; *State v. Adams*, 1 Brev. 279; *Mather v. Clark*, 2 Ark. 209; *Sherman v. Johnson*, 20 Vt. 567. Formerly, in some of the states, the rule prevailed that the mother, to be a competent witness, must have accused the father in the time of her travail and must remain constant in her accusations: *Blake v. Jenkins*, 35 Me. 433; *Beals v. Furbish*, 39 Id. 469; *Drowne v. Stempson*, 2 Mass. 443; *McManagill v. Ross*, 20 Pick. 99; *Commonwealth v. Cole*, 5 Mass. 517; *Stiles v. Eastman*, 21 Pick. 132; *Long v. Dow*, 17 N. H. 470; *Rodimon v. Reding*, 18 Id. 431; *Marston v. Jenness*, 12 Id. 137. The defendant in the prosecution is also a competent witness for himself: *People v. Starr*, 50 Ill. 52; *State v. Evans*, 19 Ind. 92; *Francis v. Commonwealth*, 3 Bush, 4; *State v. McIntosh*, 64 N. C. 607. In *Burt v. State*, 79 Ind. 359, it was held that the defendant may be compelled to testify for the prosecution. That the mother, if a married woman, is incompetent to prove the non-access of the husband will be seen by a reference to cases cited under the head of "children born during wedlock, legitimacy of;" but she may be examined to prove criminal intercourse with another: *State v. Pettaway*, 3 Hawks, 623; *Parker v. Way*, 15 N. H. 45. And in Indiana, the rule making married women incompetent to prove non-access has been changed, and she has been made competent to prove this: *Cuppy v. State*, 24 Ind. 389.

(2.) *Preponderance of Evidence is Sufficient to Convict*.—It follows from the proposition that a prosecution under the bastardy act is a civil and not a criminal proceeding (see *ante*), that the guilt of the accused need not be established beyond a reasonable doubt, as this is a principle applicable to criminal law, and that a preponderance of evidence is sufficient to convict: *State v. Nichols*, 26 Alb. L. J. 458; S. C., 13 N. W. Rep. 153 (Minn.); *Semon v. People*, 42 Mich. 141; S. C., 3 N. W. Rep. 304; *State v. McGlothlen*, 9 Id. 893; S. C., 24 Alb. L. J. 519; *Richardson v. Burleigh*, 3 Allen, 479; *Walker v. State*, 6 Blackf. 1; *Mann v. People*, 35 Ill. 467; *Maloney v. People*, 38 Id. 62; *Allison v. People*, 45 Id. 37; *People v. Christman*, 66 Id. 162; *Lewis v. People*, 82 Id. 104; *State v. McGlothlen*, 56 Iowa, 544; *People v. Cantline*, 1 Mich. N. P. 140; *Stovall v. State*, 9 Baxt. 597. In Wisconsin, the rule is different, and

there the defendant can be convicted only on testimony establishing his guilt beyond a reasonable doubt: *Baker v. State*, 2 N. W. Rep. 110; S. C., 47 Wis. 111; *Van Tassel v. State*, 18 N. W. Rep. 328. In North Carolina, the written examination of the mother is *prima facie* evidence of the guilt of the accused: *State v. Rogers*, 79 N. C. 609; *State v. Patton*, 5 Ired. L. 180; *Moody v. Goode*, 10 Id. 49; and in Iowa, a defendant may be found guilty on the unsupported evidence of the prosecutrix: *State v. McGlothlen*, 56 Iowa, 544; and where a prosecuting witness testified positively to the time and place of the begetting of the child, that the defendant begot the child, and that it was begotten in a certain room, and other witnesses corroborated her statements by testifying that the parties were together in that room at that time, and alone, the evidence is sufficient to sustain a verdict for the plaintiff, no evidence being offered for the defendant: *Kinder v. State*, 68 Ind. 454.

(3.) *Evidence of Acts of Sexual Intercourse by Plaintiff with Other Men than Defendant.*—In a prosecution for bastardy, evidence is admissible to show that the mother had sexual intercourse with other men at about the time the child was begotten, and the mother may be interrogated on this point: *State v. Read*, 45 Iowa, 469; *Ginn v. Commonwealth*, 5 Litt. 300; *Falls v. Overseers*, 3 Munf. 495; *Walker v. State*, 6 Blackf. 1; *United States v. Collins*, 1 Cranch C. Ct. 592; but evidence tending to show that she had illicit connection with other men, and interrogatories made with a view to elicit that fact from her, must be confined to a period when in the course of nature it would have been possible for the child to have been the result of such intercourse: *Duffies v. State*, 7 Wis. 672; *Townsend v. State*, 13 Ind. 357; *Barrett v. State*, 16 Ark. 530; *Meynecke v. State*, 68 Ind. 401; *Sterling v. Sterling*, 41 Vt. 80; *Knight v. Morse*, 54 Id. 432; *Crawford v. State*, 7 Baxt. 41; *Ronan v. Dugan*, 126 Mass. 176; *Sabins v. Jones*, 119 Id. 167; *Paull v. Padelord*, 16 Gray, 263; *Eddy v. Gray*, 4 Allen, 435; *Duck v. State*, 17 Ind. 210. If the defendant admit that he had sexual intercourse with the plaintiff, evidence on his part that she had had connection with other men about nine months before the birth of the child may be rejected, and he may be confined to proof of the general character of the mother: *Falls v. Overseers*, 3 Munf. 495; and if the mother testifies to the particular time when she was impregnated, and gives the reasons for her belief, it is not error to refuse to instruct the jury that if they believe she had connection with another man about the time when the child was begotten, this would destroy her competency as a witness to prove that the defendant was the father: *Kintner v. State*, 45 Ind. 175; and if she testified that she never had intercourse with any other man than the defendant, it is not error to exclude evidence of the contents of letters of a "vulgar" or "indecent" character written by her, offered "to contradict her, and to prove her intercourse with other men," if it did not appear that they contained admissions or statements of her intercourse with other men at or near the time of the probable inception of her pregnancy: *Bower v. Reed*, 103 Mass. 46. But in *Zweifel v. State*, 27 Wis. 396, it was held that evidence tending, alone or in connection with other evidence, to show that some other man (though not identified) was alone with the prosecutrix at unusual and suspicious times and places should be suffered to go to the jury. In *Low v. Mitchell*, 18 Me. 372, the complainant was not obliged to answer whether she had had sexual intercourse with another man about the same time with the man charged with being the father of the child; and although evidence to this effect was admitted in *State v. Britt*, 78 N. C. 439, it was held not to overcome the statutory presumption created by the oath of the

mother, in *State v. Parish*, 83 Id. 613; *State v. Bennett*, 75 Id. 305; and in the former case it was held incompetent, and in the latter its exclusion was held no error.

(4.) *Evidence of Resemblance of Child to Defendant*.—Evidence that the child resembled the man with whom the alleged intercourse was had, was held admissible in *State v. Britt*, 78 N. C. 439; the jury may take this into consideration if they find it to exist on an inspection of the child and the putative father: *Finnegan v. Dugan*, 14 Allen, 197; and the child may properly be exhibited to the jury, and its appearance, complexion, and features are legitimate subjects for the comments of the counsel in connection with the evidence in the case: *Gilmanton v. Ham*, 38 N. Y. 108; and this was held proper in *State v. Smith*, 54 Iowa, 104; S. C., 37 Am. Rep. 192; S. C., 6 N.W. Rep. 153, where the child was two years and one month old. But evidence of resemblance was not allowed in *Eddy v. Gray*, 4 Allen, 435; *United States v. Collins*, 1 Cranch C. Ct. 592; *Warlick v. White*, 76 N. C. 175; and evidence as to the child's eyes is inadmissible and improper: *People ex rel. Fuller v. Carney*, 16 N. Y. Week. Dig. 262. In *State v. Bowles*, 7 Jones L. 579, it was held that the defendant had a right to show that the child did not resemble him; and the defendant may prove that the child has no likeness to him, or that it resembles another man who had opportunities of illicit intercourse with the mother; but proof that the child resembled the children of another man without showing in what particular, or that such children resembled their father rather than their mother, is too vague and indefinite, and is properly excluded: *Paulk v. State*, 52 Ala. 427.

(5.) *Reputation or Rumor as Evidence of Paternity*.—Paternity is provable by reputation: *Morris v. Swaney*, 7 Heisk. 591; and reputation may be heard to establish the pedigree of illegitimate children: *Ford v. Ford*, 7 Humph. 92; but evidence of a rumor that the defendant had been improperly intimate with the relatrix is incompetent, even on the cross-examination of a witness who had testified to the defendant's good character: *Saint v. State*, 68 Ind. 128.

(6.) *Evidence of Complainant's General Character*.—Evidence as to her Prostitution.—Evidence tending to show the complainant's bad reputation for truth is admissible: *Warlick v. White*, 76 N. C. 175; both prior and subsequent to the time when the controversy arose: *Sterling v. Sterling*, 41 Vt. 80; and see *Lord v. Schweiring*, Thach. Cr. Cas. 26; and her general character for chastity may be inquired into: *Short v. State*, 4 Harr. 568; and may be proved to weaken or discredit her: *Sword v. Nestor*, 3 Dana, 453; and evidence of her former character was held admissible in *Lord v. Schweiring*, Thach. Cr. Cas. 26; but in *Commonwealth v. Moore*, 3 Pick. 194, it was held that the general character of the complainant for chastity previous to her connection with the respondent was bad was not admissible; and in *Warlick v. White*, 76 N. C. 175, evidence offered to prove her bad character for chastity during the life of her husband, and before the birth of the child, was held incompetent; and in *Walker v. State*, 6 Blackf. 1, it was said that inquiry into the general moral character of a witness should not be what it was at any former time, but what it was at the time of the trial. Evidence of the general moral character of the relatrix can not be supplemented by evidence particularizing in what respect it is bad: *Rawles v. State*, 56 Ind. 433. Evidence of common prostitution is not competent to impeach the mother: *Spears v. Forrest*, 15 Vt. 435; nor is evidence to show that she was reputed to be a common prostitute before the child was begotten: *Morse v. Pineo*, Id. 281; or that she has had such a reputation for three years preceding the accusation: *Sidel-*

inger v. Bucklin, 64 Me. 371; and it is not competent to ask the mother whether for two years last she had not been an inmate of a common brothel: *Duffies v. State*, 7 Wis. 672.

(7.) *Evidence and Statements to Impeach or Corroborate Complainant; herein of her Credibility.*—The statements made by the complainant during her confinement, as to the paternity of the child, are not admissible to confirm her testimony: *Richmond v. State*, 19 Wis. 307; but see *contra: Robbins v. Smith*, 47 Conn. 182; nor are the declarations of the attending physician, made to her during her travail, as to her condition and peril: *Eddy v. Gray*, 4 Allen, 435. But evidence of acts of familiarity between her and the defendant at a time before the child was begotten were held admissible to corroborate her statements as to the paternity of the child, in *Cole v. Manning*, 2 L. R., Q. B., 611; and admissions of the respondent that he was the father, and his promise to marry the mother, although not of themselves sufficient to sustain the prosecution, may be given in evidence to corroborate the complainant's testimony: *Woodward v. Shaw*, 18 Me. 304. Evidence that the complainant had told others that she did not know who the father was, and that no man had ever had sexual intercourse with her, should be admitted: *Thompson v. State*, 13 Ind. 473. It is admissible to discredit her testimony by disproving what she swore to on the preliminary examination before the justice: *Holmes v. State*, 1 G. Greene, 150; where the defendant introduced a witness who testified that the complainant in a certain conversation had said that the defendant was not the father, the complainant herself is competent to contradict him: *Judson v. Blanchard*, 4 Conn. 557; and where on cross-examination the complainant testifies that her mother told her that she must tell the doctor during her travail that the defendant was the father, whereupon the defendant insisted that the complainant's mother instigated her falsely to prefer this charge against him, she may introduce evidence showing that prior to this time she had informed her mother that he was the father: *Mange v. Holmes*, 7 Allen, 136; and proof by other witnesses that the complainant has made statements in reference to the paternity of the child, inconsistent with her statements upon the stand, entitles her to call witnesses to sustain her general good reputation for truth: *Sweet v. Sherman*, 21 Vt. 23. An instruction, that if the evidence impeaching the prosecuting witness is so strong as to satisfy the minds of the jury that they could not believe anything she may testify to they should find for the defendant, is correct: *Spivey v. State*, 8 Ind. 405. The credibility of the complaining witness is a matter for the determination of the jury: *Wilson v. People*, 26 Ill. 434; *McCullough v. State*, 14 Ind. 391; *McFarland v. People*, 72 Ill. 368. The defendant, being liable to be charged with the support of the child, has a direct interest in the result of the prosecution, while the relatrix has no such interest, and these facts may be considered by the jury in weighing their testimony: *Dailey v. State*, 28 Ind. 285; but in *John D. C. v. State*, 16 Fla. 554, it was said that the mother had an interest in the result which may be taken into consideration by the jury in weighing her credibility as a witness, and the court should so instruct the jury when requested to by the defendant's counsel. The jury may consider in determining the credibility of the complainant the youth of the defendant, and the testimony of the relatrix that he had never had any connection with her but once, previous to which she had had no intimacy with him whatever, and had not since intimated her condition to him or asked reparation except by instituting the prosecution: *O'Brian v. State*, 14 Ind. 469. If the court, in instructing the jury in relation to the consideration to be given to the interest of the relatrix in determining her credibility, stated "that she has an interest

in establishing the interest of her bastard child, and also in recovering a judgment for money for the maintenance of said child, and of such recovery," if any, she. "gets nothing, and has no interest other than that arising from her relationship to the bastard child, such recovery being solely for the support and maintenance of said child," the last sentence in connection with the former part of the instruction could not mislead the jury, and the instruction, taken as a whole, is not erroneous: *Decker v. State*, 53 Id. 552. But an instruction that the evidence of the relatrix should have more weight than that of the defendant, as he has an interest in the result of the prosecution and she has not, is erroneous: *Rawles v. State*, 56 Id. 433.

(8.) *Miscellaneous Questions as to Admissibility of Evidence.*—Proof of the paternal descent of natural children may be made in the following ways: 1. By all kinds of private writings in which the father may have acknowledged the bastard as his child, or may have called him so; 2. By evidence that the mother was living in a state of concubinage with him, and resided in his house at the time the child was conceived; 3. By evidence that the father, either in public or private, acknowledged the child as his, or called it his child in conversation, or caused it to be educated as such: *Badillo v. Tio*, 6 La. Ann. 129. Where the father of a natural child did not sign the registry of baptism in which he is named as its father, and was not apprised of the existence of the act, it can have no effect on him or his representatives; nor does a recital in a register of baptism signed by a residuary legatee, stating that the testator was the grandfather of the child of an alleged natural daughter, prove the paternity of the daughter, even against the residuary legatee: Id. Evidence of the declarations of the relatrix of her affection for others than the defendant is not admissible: *Rawles v. State*, 56 Ind. 433. A letter written by the defendant between seven and eight months before the time of the alleged conception is admissible as tending to show the character of the intimacy between them: *Beers v. Jackman*, 103 Mass. 192; and for the same purpose evidence of acts of sexual intercourse before the time of the begetting of the child is admissible: *Thayer v. Davis*, 38 Vt. 163; *Norfolk v. Gaylord*, 28 Conn. 309; but the plaintiff can not introduce evidence that five or six years previously she had had a child by the respondent, which he and his relations acknowledged as his: *Boyle v. Burnett*, 9 Gray, 251. And a compromise of a bastardy prosecution by the defendant is not an admission of his guilt, and not admissible as such: *Martin v. State*, 62 Ala. 119. Evidence of the defendant's impotency is proper, as it would be a complete defense: *State v. Broadway*, 69 N. C. 411; and where the proceedings are brought into the circuit court, the accusatory affidavit of the mother as well as that of the defendant are both evidence to be considered by the jury: *Oneal v. State*, 2 Sneed, 215; but the record of a judgment in an action of seduction by the relatrix against the defendant is not admissible to prove the fact of sexual intercourse: *Glenn v. State*, 46 Ind. 368. It is competent for the state to prove that the defendant, on hearing of the pregnancy of the relatrix, bought medicine to procure an abortion: *McIlvain v. State*, 80 Id. 69; see *Sweet v. Sherman*, 21 Vt. 23. Depositions are admissible in bastardy proceedings: *State v. Hickerson*, 72 N. C. 421; but where the deposition of the mother was taken before suit was commenced, and without notifying the defendant, who lived within six miles, it is not admissible, although the mother is dead: *McDonald v. Hobby*, 1 Root, 154; and see *McCoy v. People*, 71 Ill. 111.

f. *Death or Marriage, Effect of, on Proceedings.*—In *Rollins v. Chambers*, 49 Vt. 515, it was held that the right of a mother to prosecute the putative

father dies with her; but in *People v. Nixon*, 45 Ill. 353, the court decided that her death did not abate proceedings commenced during her life, as the object was to compel the putative father to secure the public as well as the mother against liability for its support. In *State v. Williams*, 8 Ind. 191, it was held that the right of action for bastardy survived against the representatives of the defendant; but the contrary rule was laid down in *Clements v. Durham*, 7 Jones L. 100. Ordinarily the marriage of the relatrix is no ground for the dismissal or abatement of the proceedings: *Roth v. Jacobs*, 21 Ohio St. 646; *Austin v. Pickett*, 9 Ala. 102; but the marriage of the complainant and defendant terminates the proceedings: *Gordon v. Amidon*, 36 Vt. 735; *Moran v. State*, 73 Ind. 208. The rule was laid down in *State v. Beatty*, 16 N. W. Rep. 149, that if the child was born dead after the institution of the proceedings but before the trial, the action abated. The death of the child after issue was regarded as proper matter for a plea *puis darrein continuance*, but not as ground for a motion to dismiss the proceedings, in *Satterwhite v. State*, 32 Ala. 578; and in such a case, if the defendant is found guilty, the court may make an allowance for the expenses prior to its death: *Smith v. Lint*, 37 Me. 546; or for so much of the amount fixed by statute as shall have accrued between the birth and death of the child: *Hauskens v. People*, 82 Ill. 193. It was said that the fact that after the verdict but before the judgment the child was born dead was no reason why the judgment should not be rendered against the defendant for whatever sum seemed just to the court: *Evans v. State*, 58 Ind. 587; and *Meredith v. Wall*, 14 Allen, 155, held that a complaint for the support of a bastard during its life might be commenced and maintained after its death.

g. *Amount Allowable for Maintenance*.—The amount allowable for the maintenance of a bastard child is largely discretionary: *Commonwealth v. Sandford*, 5 Litt. 289; *Allen v. State*, 4 Blackf. 122; *Addison v. Commonwealth*, 4 Binn. 541; *Hoffman v. State*, 17 Wis. 596; and the sum may be for the future as well as for the past support of the child: *Hoffman v. State*, *supra*; *Speiger v. State*, 32 Id. 400. The discretion of the court should be exercised with reference to the character of the parties and their situation in life: *Hoffman v. State*, *supra*. The court may allow for the lying-in expenses of the mother: *Speiger v. State*, *supra*; *Andrew v. Catherine*, 16 Fla. 830; *Sheffer v. Commonwealth*, 3 Yeates, 39; *Comstock v. Weed*, 2 Conn. 155; *Judson v. Blanchard*, 4 Id. 557. Although the statute does not authorize the court to require their payment *eo nomine*: *Speiger v. State*, *supra*. Thus in *Judson v. Blanchard*, an allowance as part of the maintenance of two charges for the board of the mother for seven weeks each, the board and wages of a nurse, and sundry articles of clothing for the mother, these expenses being found to be necessarily incurred for the child at its birth and for the nursing of the same, was held to be authorized by statute. But in *Allen v. State*, 4 Blackf. 122, it was held that damages for the seduction of the mother and the expenses of her lying-in were not recoverable. And nothing is to be given by way of damages for the charges of the child's funeral: *Penfield v. Norton*, 1 Root, 345.

h. *Discharge by Justice, when Bars Subsequent Proceedings*.—An adjudication by two justices of the peace in favor of a party charged with being the father of the child is a bar to a second proceeding against him respecting the same matter: *Thayer v. Overseers*, 5 Hill, 443; but where a person charged before a justice with being the father was on the examination of the mother discharged by the justice, the discharge is no bar to a subsequent prosecution for the same offense: *Davis v. State*, 6 Blackf. 494; and if the defendant is discharged on account of the failure of the relator to appear, the

judgment not being on the merits is no bar to further prosecution: *State v. Barbour*, 17 Ind. 526.

i. *Appearance of Defendant, Necessity and Effect of—Objections, when must be Taken.*—A prosecution for bastardy being a civil proceeding, a trial may be had without the personal appearance of the defendant: *Stokes v. Sanborn*, 45 N. H. 274; *Trawick v. Davis*, 4 Ala. 328; and an order of affiliation may be made upon the default of the defendant to appear: *Blood v. Morrill*, 17 Vt. 598; nor is it any objection to the proceedings that the complainant did not appear in person before the magistrate and testify upon the examination of the respondent: *Marston v. Jenness*, 11 N. H. 156. If the proceedings before a justice are defective, the defendant should move to quash them before he appears and impliedly admits himself to be regularly in court: *Trawick v. Davis*, 4 Ala. 328; because after appearance it is too late to object to defects and errors in the preliminary proceedings: *Cooper v. Littlefield*, 45 Me. 549; *Quow v. Conlin*, 31 Vt. 620; *Walker v. Commonwealth*, 3 A. K. Marsh. 355; *Schooler v. Commonwealth*, Litt. Sel. Cas. 89; although appearance would be no waiver of duress in giving a bond to answer the complaint: *Fisher v. Shattuck*, 17 Pick. 252; so also objection to defects in the preliminary proceedings can not be taken for the first time after the case has been removed to a higher court: *Hawes v. Gustin*, 2 Allen, 402; *De Priest v. State*, 68 Ind. 569; *Murphy v. Spence*, 9 Gray, 399; and after verdict and judgment it is too late to make any such objection: *Williams v. Copeland*, 5 Allen, 209; *Cottrell v. State*, 1 N. W. Rep. 1008; *State v. Lee*, 7 Ired. 265.

j. *Right to Compromise Proceedings under the Bastardy Act.*—The mother is generally allowed to compromise her right under the bastardy act, and to settle a pending prosecution: *Martin v. State*, 62 Ala. 119; *Coleman v. Frum*, 4 Ill. 378; *Hendrix v. People*, 9 Ill. App. 42; *Baker v. Roberts*, 14 Ind. 552; *Black Hawk Co. v. Cotter*, 32 Iowa, 125; *Burgen v. Straughan*, 7 J. J. Marsh. 583; *Getzlaff v. Seliger*, 43 Wis. 297; and in New Hampshire, where a selectman instituted the proceedings, he can make a valid compromise: *Hoit v. Cooper*, 41 N. H. 111. In *Spalding v. Fitch*, 1 Root, 319, it was held that if a female give a discharge of all demands for maintenance of the child of which she was pregnant, and afterwards it turned out that she was pregnant with two children, the discharge would bar her remedy. In Indiana a mother can not compromise a prosecution unless it is entered of record in open court, and she consents to and ratifies it: *State v. Wilson*, 21 Ind. 273; *Pickler v. State*, 18 Id. 266; *Reeves v. Ellis*, 37 Id. 441; *Harness v. State*, 57 Id. 1; *Fisher v. State*, 65 Id. 51. A note given in settlement of such a prosecution is founded on a sufficient consideration: *Havens v. Hobbs*, 1 Vt. 238; *Holcomb v. Stimpson*, 8 Id. 141; *Harter v. Johnson*, 16 Ind. 271; but a compromise obtained by fraud is bad: *Kezartee v. Cartwell*, 31 Ohio St. 522. The rule that the mother may compromise the proceeding does not prevail in every state. In Maine neither the mother nor the town has the power to settle a claim under the bastardy act without the consent of the other: *Harmon v. Merrill*, 18 Me. 150; and in Vermont a release by the mother operates only to release her claim, and does not affect the right of the overseers of the poor of the town: *Sherman v. Johnson*, 20 Vt. 567, and there such a settlement is not available against a prosecution by the overseer: *Hale v. Turner*, 29 Vt. 350; and see also *Humphrey v. Kasson*, 26 Id. 760. And in Kentucky it was held that no agreement between the mother and the putative father would bar a proceeding under the statute to compel him to give security for the support of the child: *Commonwealth v. Turner*, 4 Dana, 511. In Maryland it was decided that, until recognizance given, the mother could accept any sum she

would consider as an adequate compensation for past maintenance, and the putative father would be discharged for that; but where the receipt in terms purported to discharge the putative father from liability for future support of the child, in that respect it would be wholly inoperative, as plainly against the policy of the law: *Barber v. State*, 24 Md. 383. The defendant must plead the compromise, in order to be able to take advantage of it: *Malson v. State*, 75 Ind. 142; *State v. Wilson*, 16 Id. 134.

BOTT v. McCoy.

[20 ALABAMA, 578.]

FACTOR OR COMMISSION MERCHANT IS NOT AUTHORIZED BY LAW TO PLEDGE goods of his principal for his own use. The party receiving such a pledge and advancing his money acquires no title as against the principal; nor is it material in such a case whether the pledgee knew that he was dealing with a factor or not.

FACTOR CAN NOT DISAFFIRM HIS OWN TORTIOUS ACT in pledging the goods of his principal; the violation of his authority is injurious to the principal alone, and he may ratify or confirm the act at his pleasure; but the factor is estopped by his act, and can not be allowed to allege his own violation of authority to set aside the transfer or to recover the goods.

FACTOR PLEDGING GOODS WITHOUT AUTHORITY CAN NOT SUBSEQUENTLY SELL GOODS and enable the vendees to set aside the contract of pledge, where the contract of pledge has not been disaffirmed by the principal; and as between the pledgee and the vendee, the pledgee has the better title.

IF FACTS OF CASE ARE AGREED UPON, and the questions of law alone are submitted to the court for its judgment, the court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising thereon.

PRINCIPAL'S RECEIVING MONEY ARISING FROM SALE of goods by his factor, the factor having previously pledged the goods without authority to the plaintiff, will not be regarded as a confirmation of the sale and as a disaffirmance of the pledge if the principal was ignorant of the source from which the money came at the time he received it.

JUDGMENT OF COURT UPON FACTS WILL NOT BE REVISED where the judge is substituted by the consent of the parties in lieu of the jury; if the evidence be conflicting and he decides against the weight of testimony, or if it would have justified an inference of fact which the court refused to draw, this court will not reverse his judgment merely because it could or might have come to a different conclusion of fact (opinion on rehearing).

DETINUE on an agreed state of facts. The opinion states the case.

Hamilton and Semple, for the plaintiffs in error.

Campbell, contra.

By Court, DARGAN, C. J. The cotton sued for was received by William Bower & Co., as commission merchants, from the planters who raised it. Bower & Co. stored the cotton with the defendants, Holmes & Bott, who were warehouse keepers, and it was entered on the books of the warehouse in their name. Shortly afterwards Bower & Co. obtained an advance of money for their own benefit from McCoy & Johnson, and pledged the cotton as a security for its payment. They gave to McCoy & Johnson an order for the cotton, which being presented to the defendants, they recognized the title of the plaintiffs, and their clerk executed to them a receipt, showing that they undertook to hold the cotton for the plaintiffs, who agreed to pay the storage. After this, Bower & Co. sold the cotton to Tarleton & Scott, and gave them also an order for its delivery. The defendants recognized the title of Tarleton & Scott, and delivered them the cotton, which was re-stored with the defendants on the same day. The plaintiffs demanded the cotton of the defendants, but they refused to deliver it; whereupon this suit was brought whilst they held the cotton as the property of Tarleton & Scott. The question of law which we propose to examine arising on these facts is, Which title is to be preferred—that of the plaintiffs or that of Tarleton & Scott?

The principle can not be doubted, that a factor or commission merchant is not authorized by law to pledge the goods of his principal for his own use. The party receiving such a pledge, and advancing his money, acquires no title as against the principal. Nor is it material in such a case, whether the pledgee knew that he was dealing with a factor or not; if he knew the fact, he was bound to know that by law the factor had no authority to pledge the goods of his principal; if he did not know that the person with whom he was dealing was a factor, still his want of knowledge of this fact could not extend the authority of the factor: Story on Agency, sec. 225, and cases there cited. As such an act is not within the ordinary powers of a factor, it is clear that it can not work a divestiture of the title of the principal; and he may pursue the goods in the hands of the pledgee, or may bring trover against both the pledgee and factor, or either of them, at his election: *Id.*, sec. 437.

But this violation of the factor's authority is injurious to the rights of the principal alone; he may ratify or confirm the act at his pleasure; and if he is content therewith, no one else can complain. Certainly it would be contrary to all rule to suffer the factor himself to allege his own tortious acts as a ground

for setting aside the contract. He can not bring trover or detain in his own name, and recover of the pawnee the goods, on the ground that he had tortiously violated his authority, and thereby injuriously affected the rights of his principal. I apprehend that no case can be found where a trustee or a bailee, who has converted the goods intrusted to his care, has been allowed to recover the goods from his vendee, on the ground that he had violated his authority in making the sale.

But on the contrary, every one who undertakes to transfer goods, whether it be by way of pledge or sale, impliedly stipulates that he has the authority or the right to do so; and he must be held estopped by his act, and can not and ought not to be allowed to allege his own violation of authority, to set aside the transfer or to recover the goods. This principle of law has frequently been recognized by this court. In the case of *Pistole v. Street*, 5 Port. 64, an administratrix having intermarried, her husband sold a slave belonging to the estate of the decedent, without authority from the county court, and after the death of her husband she brought suit against the husband's vendee to recover the slave, on the ground that he was sold without authority. But this court held that the act of her husband must be considered as her own; and although the creditors and distributees were not without remedy, yet she was estopped, and could not set up her want of authority to sell. Again: in the case of *Fambro v. Gantt*, 12 Ala. 298, it was held that though no title passed to the purchaser by a private sale of the property of an estate by the administrator, yet the administrator was estopped from recovering it in his own name.

These authorities, as well as the principle on which they rest, to my mind are conclusive to show that Bower & Co. could never recover the cotton from McCoy & Johnson; for they can not set up their own tortious act on the rights of a third person, to set aside their contract. As to them it is valid, and their principal alone, who was injured by it, can set it aside. The necessary sequence from this proposition is, that if Bower & Co. can not themselves recover the cotton of McCoy & Johnson, they can not by a sale in their own name enable another person to do so. This would be to allow them to do through another what they could not do themselves. The cotton was in the possession of the plaintiffs at the time of the sale to Tarleton & Scott, and by virtue of a contract that gave them a good title as against Bower & Co.; the sale to Tarleton & Scott was in pursuance of the original authority which Bower & Co. had abused;

but so far as the record discloses, the planters to whom the cotton in fact belonged have not complained; they may be content with the transfer by way of pledge. Under such circumstances, neither Bower & Co. nor any one claiming under them can allege the injury done to the owners of the cotton, by a tortious violation of the authority intrusted to Bower & Co., to set aside the contract by which McCoy & Johnson obtained the possession of the cotton. We will not say that the owners of the cotton might not in their own name have sold it, and thereby enable their vendee to recover. But we feel assured that Bower & Co. could not, by virtue of their original authority, sell in their own names, and enable their vendees to set aside a contract which was at least binding on them. We therefore come to the conclusion that the title of McCoy & Johnson is superior to that of Tarleton & Scott. They both originate from the same source, to wit, from Bower & Co.; and the title of the plaintiffs is valid against all the world, except as against the original owners of the cotton, who alone were injured by the tortious act of their factors. But as they have not complained of it, no one else can.

This view of the case renders it unnecessary to examine in what cases, and under what circumstances, a bailee may defend himself when sued by his bailor, to recover the goods intrusted to his care, by interposing a superior title in another which he, the bailee, has recognized.

It is however insisted, that the facts agreed upon would warrant the inference that Bower & Co. were acting as the agents of McCoy & Johnson in making the sale to Tarleton & Scott. It is a sufficient answer to this to say, that where the facts of a case are agreed upon, and the questions of law alone are submitted to the court for its judgment, we can only respond to the questions of law arising upon the admitted facts. The inference of one fact from another is a question of fact, and not of law, and this inference must be drawn by a jury; and it would be traveling out of the province of the court, as well as of the agreement in this case, if the court was to infer another fact, and pronounce the law arising thereon.

It was also shown that Bower & Co. paid to the plaintiffs a considerable portion of the money received from Tarleton & Scott on the sale of the cotton, upon an account due by them to the plaintiffs anterior to the pledge of the cotton; but the plaintiffs were ignorant of the source from whence the money came at the time they received it. On this evidence it was contended that the act of the plaintiffs in receiving the money ought to be con-

strued as a confirmation of the sale, or at all events, as a credit upon the amount they otherwise would be entitled to recover. But as the plaintiffs did not know that the money paid to them was part of the proceeds of the cotton, they did not, by receiving it, confirm the sale to Tarleton & Scott; and as the amount received by them was credited upon a prior indebtedness, the amount they advanced to Bower & Co. upon the cotton is still due them.

In view of all the facts, we see no error in the judgment, and it must be affirmed.

NOTE.—A rehearing was granted in this case, and the following opinion afterwards delivered:

By COURT. This cause has been reargued, and we are satisfied that the principle of law pronounced in the opinion is correct. In reference to the question of fact, whether Bower & Co. were not the agents of McCoy & Johnson in making the sale to Tarleton & Scott, we will only add, that when the judge is substituted, by consent of the parties, in lieu of the jury, we will not revise his judgment upon the facts. If the evidence be conflicting, and he decides against the weight of testimony; or if it would have justified an inference of fact which the court refused to draw, we will not reverse his judgment merely because he could or might have come to a different conclusion of fact: *Etheridge v. Malempre*, 18 Ala. 565.

AGREED STATEMENT OF FACTS, JUDGMENT ON, AND EFFECT OF: See *Moore v. Philbrick*, 52 Am. Dec. 642; *Jarboe v. Smith*, Id. 541.

ACCEPTING BENEFITS FROM UNAUTHORIZED CONTRACT OF AGENT DOES NOT RATIFY IT, when: See *Bryant v. Moore*, 45 Am. Dec. 96.

FACTOR CAN NOT PLEDGE GOODS OF PRINCIPAL: *Bowie v. Napier*, 10 Am. Dec. 641.

HARRISON v. HARRISON.

[20 ALABAMA, 629.]

DOMICILE OF HUSBAND DETERMINES DOMICILE OF WIFE, and the removal of the wife from the state where the husband is domiciled does not operate to change her domicile, although she is induced to leave him by his harsh treatment.

ONE STATE CAN NOT ANNUL MARRIAGE OF PARTIES DOMICILED in another state; its sentence would be utterly void, and no consent can in such a case confer jurisdiction.

JURISDICTIONAL FACTS STATED IN BILL MUST BE DEEMED TO BE TRUE in a suit on a decree, when the decree is collaterally attacked

CONDONATION IS ACCOMPANIED WITH IMPLIED CONDITION, that injury shall not be repeated, and a repetition of the injury takes away the condonation and operates a revivor of the former acts.

WIFE MAY MAINTAIN BILL FOR ALIMONY IN ANOTHER STATE than that in which the parties have their domicile, where the wife is a resident of that state, and has been driven to a residence there by the husband's cruel treatment of her, if the court obtain jurisdiction of the husband; the question of legal domicile would interpose no obstacle in such a case, for when it is necessary to the protection of the wife against the actual or threatened injury of the husband, the law, and much more equity, will pretermitt the legal fiction of their unity.

WHERE COURT HAS JURISDICTION OF SUBJECT-MATTER, AND PARTY IS PRIVILEGED from its jurisdiction, he may waive such privilege, and a pleading to the merits, or submitting to answer without raising the objection to the jurisdiction on account of such privilege, is a waiver of the objection.

SUBSEQUENT DECREE OF DIVORCE DOES NOT VACATE PREVIOUS DECREE FOR ALIMONY due anterior to its rendition.

PROVISION FOR ALIMONY TERMINATES ON DIVORCE being granted to the husband, although the decree for alimony did not fix upon that as a period terminating the provision made by its decree for the wife.

IN ABSENCE OF EVIDENCE AS TO INTEREST LAW OF ANOTHER STATE, no interest can be calculated in a suit on a decree of a sister state.

COURT CAN NOT JUDICIALLY KNOW INTEREST ALLOWABLE IN SOUTH CAROLINA from the table required to be appended by the secretary of state to the published acts of the legislature.

DEBT on an agreed statement of facts by Harriet Harrison against the personal representatives of Kirkland Harrison, upon a decree rendered in the Fairfield district chancery court of South Carolina. The facts substantially are that Harriet Ellison, the plaintiff, married Kirkland Harrison in 1828, in South Carolina, and that they resided there until they moved in 1834 to Dallas county in this state, where they permanently settled. Shortly after their removal Harriet returned to South Carolina, and brought a bill in equity against her husband, setting out their marriage; that shortly after that event he began to treat her harshly and cruelly, and that for four years his conduct was so unbearable and outrageous that her parents removed her to their home; that he called upon her subsequently and made solemn assurances of reform, and she returned to his home with him; that he did not again abuse her till they removed to this state, and that then he resumed his old habits and treated her with the greatest violence, so that she left his house and returned to South Carolina. The bill prayed separate maintenance, and that she be protected in living separate and apart from him. The defendant answered this bill for alimony, and raised no

question to the jurisdiction of the court. The court upon hearing the evidence decreed a third of the income of Kirkland Harrison for the maintenance of Harriet. After this decree for alimony was rendered, Kirkland Harrison filed a bill for divorce *a vinculo matrimonii* from Harriet, in South Carolina, and a decree for divorce was had on publication. Subsequently Kirkland Harrison married one Margaret Smith, and on his death this action was brought against her, as his administratrix, and others. Judgment for the plaintiff below for thirty-two thousand three hundred and eighty-six dollars and twenty-nine cents, from which the defendant appealed.

Lapsley and Hunter, for the plaintiffs in error.

Gayle and Gayle, S. F. Rice, and Boyce, contra.

By Court, CHILTON, J. We have listened with much attention to the able arguments of the respective counsel engaged in this cause, and have carefully examined the several positions and numerous authorities submitted by them, and having given to the case the consideration which the novelty and importance of several of the questions involved in it demand, it is made my duty to announce, as briefly as I may, the conclusions attained by the court.

1. The first and most important inquiry is, Had the chancery court of the state of South Carolina jurisdiction to render the decree here sued upon? If it had not, an end is at once put to the case.

No principle of law appears to be more generally recognized, or better established by judicial decisions, than that the domicile of the husband determines that of the wife. Mr. Phillimore, in his work on domicile, p. 27, says: "The maxim of the Roman and continental civilians, as also of this country and America, is, that as the wife takes the rank, so she does the domicile of her husband."

Judge Story, in his work on the conflict of laws, sec. 46, says: "A married woman follows the domicile of her husband. This results from the general principle, that a person who is under the power and authority of another possesses no right to choose a domicile."

In legal contemplation, husband and wife constitute one body, and can not be domiciled in different states, so long as the relation upon which their legal identity depends remains unimpaired: *Dougherty v. Snyder*, 15 Serg. & R. 84, 90 [16 Am. Dec. 520].

2. Applying this well-established rule of law to the case before us, it is quite clear, that upon the removal of Kirkland Harrison and the plaintiff below, who was then his wife, from the state of South Carolina, and their permanent settlement in Dallas county in this state, the latter place became their domicile, and that the return of the wife to the place of their former residence in South Carolina, within a few months after their removal to this state, in no wise operated to change that domicile. At the time Mrs. Harrison filed her bill in the chancery court of Fairfield district, in the state of South Carolina, her legal domicile was in this state, although she resided in that, which was her matrimonial as well as actual domicile.

In *Chichester v. Donegal*, 1 Add. E. R. 19, it was said that a party may have two domiciles, the one actual, the other legal, but that the husband's actual and the wife's legal domicile are one, wheresoever she may be personally resident. See also *Shackell v. Shackell*, and *Warrender v. Warrender*, cited by Mr. Phillimore on Domicile, p. 31.

Having shown that at the time of the exhibition of the bill by Mrs. Harrison both she and her husband were legally domiciled in this state, it remains to consider whether, conceding this fact, the jurisdiction of the court as respects the subject-matter of the bill attached, and what effect the actual non-residence of Kirkland Harrison had upon its power to proceed.

3. It is insisted on the part of the counsel for the appellant, that the subject-matter of the South Carolina controversy was the marriage relation existing between these parties. They contend, that upon the removal of the parties to this state they brought with them that relation, and that the duties and obligations imposed upon them as springing out of it, not only as affecting themselves and their family, but also as affecting society with which they stand connected, must be under the sole regulation and control of our own law, and not the law of a foreign jurisdiction.

Now it is most unquestionably true, that no independent state could for a moment tolerate any interference on the part of a foreign tribunal with this, the most sacred and important of all the domestic relations which obtain among its citizens. It is a relation the intermeddling with which involves consequences most usually reaching far beyond the immediate parties to it, as it lies at the very basis of civilized society, and becomes so interwoven with its very framework as to render it the peculiar object of exclusive control by the laws and tribunals where it

exists. So that, had the state of South Carolina attempted to annul the marriage, it is very clear the subject-matter, the marriage relation, being without the jurisdiction of that court, its sentence would have been utterly void, and no consent could have given it jurisdiction; for the rule is too well settled to admit of any doubt, that consent in such case can not confer jurisdiction: 2 Bac. Abr., Bouv. ed., 618; *Wyatt v. Judge*, 7 Port. 37; *Merrill v. Jones*, 8 Id. 554-556; *McCall v. Peachy*, 1 Call, 55; *Lindsey v. McClelland*, 1 Bibb, 262; *Brown v. McKee*, 1 J. J. Marsh. 476; see also Story's Conf. L., sec. 230 a.

In the case of *Hanover v. Turner*, 14 Mass. 227 [7 Am. Dec. 203], which was an action of *assumpsit* against the husband for necessaries furnished the wife, who had by his cruel treatment been forced to abandon him, the husband pleaded that he had obtained a divorce from his wife anterior to the furnishing of the supplies to her; but it appeared he had gone to Vermont and resided temporarily in that state for the purpose of obtaining a divorce, the wife never having been within that jurisdiction, and that the alleged ground of divorce took place in Massachusetts, the state of their permanent domicile. The court held the divorce granted by the Vermont court utterly void, and said: "If we were to give effect to this decree, we should permit another state to govern our citizens in direct contravention of our own laws, and this can be required by no rule of comity." Such is undoubtedly the correct rule of law, and we recognize it to the fullest extent; but upon a calm and careful review of the facts of this case, we feel constrained to hold that they do not bring it within the influence of this principle.

4. In this case the parties were married in South Carolina, and resided permanently there for several years, and assuming the jurisdictional fact stated in the bill to be true, as we must when the judgment or decree is collaterally attacked, it appears the husband, while domiciled in that state, by his improper conduct towards the wife, furnished her the cause of complaint, which is made the ground of the relief afforded by the decree now sued upon.

While resident there, a separation took place, by reason of his maltreatment, and Mrs. Harrison was induced to return to him, upon his promise of amendment and future kind treatment. This promise he failed to redeem, and by his failure deprived himself of the benefit of the intervening pardon or condonation of the wife. She became thereupon remitted to her original remedy afforded by the tribunals of that state, for the cruelty

and abuse inflicted upon her. Condonation is accompanied with an implied condition that the injury shall not be repeated, and that the repetition of the injury takes away the condonation, and operates a revivor of former acts: *Durant v. Durant*, 1 Hag. Ecc. 761; *D'Aguilar v. D'Aguilar*, Id. 781; *Ferrers v. Ferrers*, 1 Hag. Con. 130; Shelford on Div. 446. Besides, this doctrine of forgiveness as a bar is not presumed so readily against the wife as the husband, for it is esteemed both legal and meritorious for her to be patient under her suffering, stimulated by the hope that by her meek and proper deportment toward her husband she may win him back to a sense of duty, and produce in him a reformation. Forbearance, therefore, to abandon him and sue does not weaken her title to relief: *Durant v. Durant*, *supra*; Shelford on Div. 448.

It is very clear that, according to the facts of the case presented by the record of the wife's recovery in the chancery court of Fairfield district, she had a right, before her removal to this state, to relief against her husband, according to the law as administered in the chancery courts of South Carolina. That relief would not extend to annulling the marriage, for it appears that divorces are never granted in that state; but it extends to the protection of the wife, and a provision for herself and infant child, by way of maintenance or alimony, to continue until the husband is willing to take his wife back and treat her with conjugal affection. The marriage remains of force notwithstanding the decree, and the husband is shorn of his power to inflict further injury upon his wife, whom, by his bad conduct and ill treatment, he has driven from his house. Although her legal domicile was in Alabama, yet she was actually resident in South Carolina, and as such, entitled to the protection afforded by the laws of that state. Had her husband gone there and attempted violence upon her, or by force to take her out of that jurisdiction, so as to continue his cruel treatment towards her, we entertain no doubt as to the powers and jurisdiction of that court to restrain him, and to grant the relief usually afforded in such cases. He was subject to be proceeded against before he left, and being found within the jurisdiction, even temporarily, the wife could enforce against him her claim for maintenance, while the court would provide for her protection by restraining him from molesting her. The question of legal domicile would interpose no obstacle in such case; for when it is necessary to the protection of the wife against the actual or threatened injury of the husband, the law (and much more will equity) pretermits

the legal fiction of their unity. It is upon this principle that she may give evidence against her husband when prosecuted for injuries inflicted upon her, and compel him to find sureties for the peace: 1 Greenl. Ev., sec. 343.

The transfer of their domicile to this state does not destroy the wife's right to proceed in South Carolina, for a ground of complaint is complete in that state before their removal, provided the parties can be subjected to that jurisdiction by being personally served with the process of the court.

In *Dorsey v. Dorsey*, 7 Watts, 349 [32 Am. Dec. 767], cited by Mr. Justice Story in his Conflict of Laws, sec. 230 a, Mr. Chief Justice Gibson, after stating that the transfer of allegiance and domicile is a contingency which enters into the views of the parties when they contract marriage, and of which the wife consents to bear the risk, proceeds to say, that "by sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; but with this limitation, we part not with the remedy of past transgression."

It follows, therefore, that unless there was a want of jurisdiction as to the person of the defendant, the South Carolina decree is valid, since it does not annul or attempt to impair the relation of marriage, but only affords a remedy for the violation of obligations, and seeks to enforce duties growing out of that relation.

Upon the subject of the jurisdiction as affected by the non-residence of Kirkland Harrison, a few words may suffice. Conceding that he might have availed himself of his residence in this state to have defeated a recovery, we think it clear that his failure to raise the objection must be regarded as a waiver of it. The rule appears to be well established, that where the court has jurisdiction of the subject-matter, and the party is privileged from its jurisdiction, he may waive such privilege: 2 Bac. Abr., Bouv. ed., 618, and authorities there cited. It is also settled, that pleading to the merits, or submitting to answer without raising the objection to the jurisdiction on account of such privilege, is a waiver of the objection: Daniell's Ch. Pr. 715; Story's Eq. Pl., sec. 721, and cases there cited.

These considerations lead us to the conclusion, that the decree sued on is not void for want of jurisdiction.

5. But it is strenuously urged that, conceding the chancery court of Fairfield district had jurisdiction to render this decree, the divorce which the husband subsequently obtained from the plaintiff below operates a complete bar to her recovery. On

the other side, it is replied, that the divorce is void for want of jurisdiction over the person of the wife; or that, conceding it to be valid, the previous decree in South Carolina having determined upon the death of one of the parties or their reconciliation, as periods when the provision for the wife's support should cease, the chancery court of this state could not add to that decree, by holding the provision should cease upon their divorce.

We shall not stop to inquire whether this divorce was regularly obtained and was binding upon these parties. That identical question was before us at a previous term of this court, and after a full examination, we determined that the decree was not void. The subsequent argument of the point, and the additional grounds taken, have failed to shake our opinion in the correctness of that decision.

But although that decree was predicated upon the ground of the wife's abandonment of her husband, we think it by no means follows that it estops the wife from recovering the amount decreed before its rendition as a provision for her support. No case has been cited, and we have been unable to find one, which holds that a subsequent decree of divorce has the effect to vacate and avoid, in this indirect manner, a moneyed decree previously rendered, as to the amount due upon it anterior to the divorce. To hold that the decree of divorce should have the effect of vacating the previous decree for the alimony due anterior to its rendition would be to allow the party to do indirectly what he could not have accomplished by a direct proceeding.

We are of opinion that both decrees may stand, so far as in their results they are not incompatible with each other. The subject-matter and object of each are wholly different. The first seeks to enforce the obligations and duties springing out of the relation of marriage; the second, entirely to annul that relation, and having effected the contemplated object, puts a period to the operation of the first, which is necessarily dependent upon that relation. True, the South Carolina court, not recognizing the doctrine of divorce, did not fix upon that as a period terminating the provision made by its decree for the wife; but when she seeks her remedy in this state, where divorces are granted, she submits to the law of the forum governing that remedy; and as by this law an end has been put to the relation of marriage, as effectually as would have resulted from the death of either of the parties, as a consequence, all duties and

obligations necessarily dependent upon the continuance of that relation immediately cease.

After the best reflection we have been enabled to bestow upon this case, we come to the conclusion that the plaintiff below is entitled, according to the decree which is the foundation of her action, to recover one third of the net annual income of her late husband, estimated to have been annually eight thousand five hundred dollars, from the eighteenth day of April, 1837, down to the time of the divorce, which was the fifteenth of January, 1844, embracing a period of seven years, less three months and three days.

The judgment of the circuit court, which is based upon an extension of the period to the death of the husband, is clearly erroneous, and must be reversed; and judgment must here be rendered for the correct amount, which is computed as follows: One third annual income from the eighteenth of April, 1837, to the fifteenth of January, 1844, say six years and nine months, less three days, is nineteen thousand one hundred and one dollars and thirty-eight cents; from this sum must be deducted the sum of seven hundred and thirty dollars, the proceeds of the sale of the slaves, and also the sum of seven thousand one hundred and twenty-four dollars, the moneys collected by the commissioner from Messrs. Harrison and Whitaker, and paid to the complainant in South Carolina, leaving the amount for which judgment must be here entered eleven thousand two hundred and forty-seven dollars and thirty-eight cents.

6 and 7. It is settled, that in the absence of evidence as to the interest law of another state, none can be calculated; neither can this court judicially know the interest allowable in South Carolina, from the table required to be appended by the secretary of state to the published acts of the legislature. This point has several times been decided by us. Such evidence should have been offered in the primary court, that the opposite party might have controverted it had he seen proper to do so.

Let the judgment be reversed, and accordingly rendered, to be levied of the goods and chattels of the intestate in the hands of the plaintiffs in error unadministered, and let the plaintiffs in error recover their cost.

DOMICILE OF HUSBAND, WHEN DOMICILE OF WIFE: See *Dougherty v. Snyder*, 16 Am. Dec. 520; *Harding v. Allen*, 23 Id. 549; *Harteau v. Harteau*, 25 Id. 372.

COURT CAN NOT JUDICIALLY KNOW RATE OF INTEREST IN ANOTHER STATE until it has been ascertained as any other fact by the finding of a jury: *Cooke v. Crawford*, 46 Am. Dec. 93.

DIVORCES, WHEN GRANTED FOR CAUSES ARISING WITHOUT JURISDICTION: See *Frary v. Frary*, 32 Am. Dec. 395, and note; see also *Dorsey v. Dorsey*, Id. 767.

HOGAN v. REYNOLDS.

[21 ALABAMA, 56.]

PAYMENT OF JUDGMENT AGAINST SURVIVING PARTNERS BY EXECUTOR of the deceased partner operates as a satisfaction of the judgment, and the executor can not, by taking an assignment of the judgment, keep it alive to coerce payment from the surviving partners.

REYNOLDS brought suit against Hogan, Tompkies, and Hardie; Hardie died pending the suit, and judgment was recovered against the survivors. One Smoot paid the judgment and took an assignment of it to himself. It appeared that Smoot did not pay the money for himself, but that half was furnished by the executor of Hardie and the other half by Tompkies. Hogan then moved to have satisfaction of the judgment. And the court ruled that the money furnished by Tompkies was *pro tanto* a satisfaction, but that that furnished by the executor was not. Hogan brought error.

Watts, Judge, and Jackson, for the plaintiff in error.

Rice and Morgan, *contra*.

By Court, DARGAN, C. J. The case of *Bartlett v. McRea*, 4 Ala. 688, fully sustains the plaintiff in error, and shows that the court erred in the charge given to the jury. In that case Bartlett & Waring had recovered a judgment against McRae, as surviving partner of McRae & Lang, on which execution had been issued, and was returned no property. After this they sued Mrs. Lang, as the administratrix of Willis Lang, the deceased partner, and obtained judgment against her. She then paid the amount of the judgment to Bartlett & Waring against McRae, and took an assignment of it to herself. McRae afterwards moved the court to quash the execution, and to have satisfaction of the judgment entered. This court held that Mrs. Lang could not, by paying the amount due on the judgment and taking an assignment of it, continue it in force for the purpose of having execution against McRae, the surviving partner. The case at bar falls directly within this decision; for, though the judgment was assigned to Smoot, it was paid in part by Tompkies, and in part by John T. Hardie, as executor of John Hardie, deceased; that is, Tompkies and John T. Hardie fur-

nished the money to Smoot, who paid the judgment to Reynolds, and the money furnished by John T. Hardie belonged to the estate of John Hardie, deceased, who was bound for the debt as a copartner. Reynolds, therefore, has received his money, and from those who were liable to pay it. This is a satisfaction, and the judgment can not be kept on foot to coerce collection out of Hogan for the benefit of the other members of the firm.

The rule established by the case of *Bartlett v. McRae* may be thus stated: If a judgment is paid by one who is a principal in the debt, and, as such, is bound to pay, he can not, by obtaining an assignment of the judgment, keep it alive in order to coerce payment from his co-principal; and we can not permit him to do, in the name of another, what he would not be allowed to do in his own.

Let the judgment be reversed and the cause remanded.

CHILTON, J., did not sit in this case.

ROBY v. LABUZAN.

[21 ALABAMA, 60.]

PROCESS OF GARNISHMENT RELATES ONLY TO TIME OF ITS SERVICE; and if there is no indebtedness at that time from the garnishee to the defendant in the attachment, the plaintiff will not be entitled to judgment, although it may appear that between the time of service and answer the garnishee became indebted, and paid the debt to the defendant in attachment.

PROCESS OF GARNISHMENT CAN REACH ONLY LEGAL RIGHTS of the defendant; it reaches such debts as can be enforced by the defendant in the attachment by suit at the common law, and such property as would be liable to seizure and sale if the sheriff could get possession of it. It does not reach cotton in the hands of the garnishee on which the garnishee has made advances.

ATTACHMENT CAN BE LEVIED ONLY ON SUCH PROPERTY AS IS SUBJECT OF LEVY and sale under execution.

LABUZAN was summoned as a garnishee in an attachment suit by Roby against one Jones. He denied that he was indebted to Jones, and made the following statement: That the late firm of Curry, Desmukes & Co., of Mobile, of which Jones was a member, at the instructions of Jones, shipped a quantity of cotton to him; that the cotton belonged to Jones personally; and that he (Labuzan) had made a large advance on the cotton, paying part to the firm and part to Jones; the shipment was before

the garnishment; that he (Labuzan) had shipped the cotton to a firm in New Orleans to be sold, and that at the date of the service of the garnishment it had not been sold; that Jones had directed him to be governed by the instructions of Curry, Desmukes & Co., respecting the sale of the cotton and the payment of the proceeds. Labuzan further stated that the cotton, after the service of the garnishment, was sold in New Orleans, and that after deducting for his advances, he had paid the money over to the firm of Curry, Desmukes & Co.

George N. Stewart and Percy Walker, for the plaintiff in error.

William G. Jones, contra.

By Court, DARGAN, C. J. The decisions of this court have settled the question, that the process of garnishment relates only to the time of its service; and if there is no indebtedness at that time from the garnishee to the defendant in the attachment, the plaintiff will not be entitled to judgment, although it may appear that, between the time of service and answer, the garnishee became indebted and paid the debt to the defendant in attachment: *The Branch Bank at Mobile v. Poe*, 1 Ala. 396; *Hazard v. Franklin*, 2 Id. 349; *Payne v. Mayor etc. of Mobile*, 4 Id. 333. In *Hazard v. Franklin*, *supra*, it was said, that even if the garnishee held notes on others belonging to the defendant at the time of the service of the writ, and which were subsequently paid to him, still, as there was no actual indebtedness from the garnishee at the time the garnishment was served, the plaintiff was not entitled to recover: *Hazard v. Franklin*, *supra*. It is, however, urged that these decisions take too narrow and restricted a view of this remedy, and are contrary to the decisions of the other states of the Union, as well as the decisions of England, upon process of this kind arising out of the custom of London.

I admit that the courts of Massachusetts, Pennsylvania, and some other states hold a different rule, and in England the rule seems to be, that the garnishee may answer or plead immediately, if he has no funds, and thus discharge himself; but if he does not, and waits until he becomes indebted, or has property in his hands belonging to the defendant, he must then answer as to such property or indebtedness: the issue relating to the time of the answer, and not to the time of the service of the process: *McDaniel v. Hughes*, 3 East, 374.

I confess, that if the question was an open one, I should be disposed to hold in conformity with the English decisions,

which have been adopted by most of our sister states in which the question has arisen. But our predecessors have settled the rule otherwise; it has become well known, and has constantly been acted upon, and we must yield to it.

But it is contended that the garnishee, though not strictly indebted at the time of the service of the writ, nevertheless had property in his possession, to wit, the cotton, and that he is liable for the value thereof, over and above the advances made by him to Jones, the defendant in attachment. To this argument I can not assent. The process of garnishment can reach only the legal rights of the defendant. What I mean by legal rights is, that it reaches such debts as can be enforced by the defendant in the attachment by suit at common law, and also such property as would be liable to seizure and sale if the sheriff could get possession of it.

In the case of *Harrell v. Whitman*, 19 Ala. 135, we held that the process of garnishment must be considered as a legal and not as an equitable proceeding; and therefore, the defendant's right to the fund or property sought to be condemned must be a legal as contradistinguished from an equitable one; and in the course of that opinion it was said: "If we ever depart from the plain rule that an attachment and garnishment can operate only on the legal rights of the defendant, there would be no stopping point, and we should have to go the full length, that equitable rights might be attached by garnishment in a suit at law; and thus a court of law would become invested with cognizance of equitable rights, and bound to ascertain and condemn them, however difficult the task might be, or however incompetent the powers of the court for this purpose." That decision is well sustained by the previous adjudications of this court, and we feel no inclination to depart from it.

It may, however, be said, that the right of Jones to the surplus, after paying the advances, is a legal and not an equitable right. I admit it is so, after the money came into the hands of Labuzan, the garnishee; but, considering the cotton as property at the time of the garnishment, and we are bound so to consider it, it is very clear that it could not have been levied on in the possession of the garnishee, who had made advances upon it. The defendant in the attachment had parted with the possession and control of the cotton, and was only entitled, after the sale, to the surplus, if any, after paying the amount advanced to him. In that condition the cotton was not subject to execution at law, and I do not see how it could be liable to attachment. An at-

tachment can be levied only on such property as is the subject of levy and sale under execution; and if one be garnished on the ground that he has property of the defendant's in his possession or under his control, it must be shown that the property is such as is the subject of levy and sale under execution. If, then, we consider the cotton as property in the possession of Labuzan, it could not be sold under legal process against the defendant, and consequently it can not be reached by process of garnishment; and if we consider the right of Jones as the mere right to demand the surplus of the money it might bring, after the payment of the advances made by Labuzan, then the decisions we have referred to furnish the decisive answer, that at the time of the service of the writ there was no debt due from the garnishee to the defendant in the attachment.

It may be that our decisions have so restricted the operation of this process as to lose some of the benefits that creditors might have derived from it; but we deem it best to adhere to them, and let the legislature extend the remedy.

As we come to the conclusion that the plaintiff is not entitled to a judgment against the garnishee, even admitting that he had paid over the money to Jones himself, or to Curry, Desmukes & Co., as the agents of Jones, it is unnecessary to examine the questions growing out of the contest between the plaintiff and Curry, Desmukes & Co., who claimed to be the transferees of the money paid by Labuzan to them.

Let the judgment be affirmed.

GARNISHEE IS NOT LIABLE UNLESS IT APPEARS HE HAD "PROPERTY, CREDITS OR EFFECTS" in his possession belonging to the defendant in the attachment suit, or was "indebted" to him: *Carson v. Allen*, 54 Am. Dec. 148.

ATTACHMENT PROCESS OPERATES ONLY ON SUCH INTERESTS AS EXIST at the time it is served, and not on such as may thereafter arise: *Arrington v. Screws*, 49 Am. Dec. 408.

HOLT v. ROBINSON.

[21 ALABAMA, 106.]

CONSIDERATION, SUFFICIENCY OF.—Any act of the plaintiff from which the defendant derives a benefit, or from which the plaintiff may sustain any detriment or inconvenience, is a sufficient consideration to support a promise.

SHERIFF RECEIVING NOTE FROM DEFENDANT INSTEAD OF MONEY, and returning the execution satisfied, can not set aside the return and have another execution issue. So far as he was concerned, he could only look

to that which he had voluntarily elected to receive as a satisfaction; and a note given by the executor of the execution defendant to the sheriff, on the condition that he will not amend his return of execution satisfied, is without consideration, and the officer is not placed in a better condition by the fact that he agreed to pay the judgment, and that the note was executed with a full knowledge of all the facts.

CONSIDERATION OF NOTE MAY BE IMPEACHED WITHOUT SWORN PLEA.

ERROR to the Barbour circuit court. The opinion states the case.

Cochran and Sayre, for the plaintiff in error.

Buford, *contra*.

By Court, GOLDTHWAITE, J. The circumstances under which the note sued on was given were as follows: Robinson, the deputy sheriff, held an execution against William Holt, which he had returned satisfied, on receiving from one Jernegan, who had money in his hands belonging to said Holt, and to whom he had been referred for a settlement, the amount due on the execution. He also gave to Jernegan a receipt, to the effect that he had by him received of the defendant in execution the amount of the debt, costs, etc. Some time after this, William Holt died, and his son, the present defendant, being his executor, settled with Jernegan, and on the production of the execution, with the return indorsed, and the receipt for the amount specified therein, paid him a small balance. After this, Jernegan died, wholly insolvent, and on the fact being communicated by the plaintiff to the defendant, that the note of Jernegan was all that had been received in satisfaction of the execution, and upon the representation and legal opinion of an attorney, that the return of satisfaction could be set aside by the sheriff and an execution issued, he executed his note for the amount of the judgment, on the consideration that the deputy sheriff was not to have the return set aside, and was to pay the execution, and the note of Jernegan was indorsed to him by the plaintiff, without recourse. Upon this state of facts, the court charged, "that if the execution had been satisfied in no other way than by the note of Jernegan, and the note sued on was given by the defendant with a full knowledge of that fact, and on condition that the plaintiff should not make an effort to amend his return on the execution, the consideration was sufficient to support the note."

It will be observed that the transfer of the note of Jernegan to the defendant was not referred to as constituting any por-

tion of the consideration, and indeed, the evidence shows that neither party attached any value to it; so that the only question presented for the determination of this court upon the charge is as to the correctness of the legal proposition asserted in relation to the consideration of the note.

The rule is, that any act of the plaintiff from which the defendant derives a benefit, or from which the plaintiff may sustain any detriment or inconvenience, is a sufficient consideration to support a promise. Testing it by this rule, we think it clear, upon the facts as stated in the record, that the note had no consideration to support it. The plaintiff, in the performance of his official duties, instead of collecting the money, chose to receive in its place, from the person to whom he had been referred for the settlement of the execution, his note, and to return the execution satisfied. Now, although the plaintiff in the execution could have set aside this return, as prejudicial to his rights, it is clear that the sheriff could not have done so. Conceding that the sheriff may amend his return in cases of mistake or fraud, in this case there was neither the one nor the other. He had elected to receive the note as money, and had, upon his official oath, made his return, acknowledging that he had received the amount of the execution, and, on his own motion, he would not be allowed to falsify this return. So far as he was concerned, he could look only to that which he had voluntarily elected to receive as satisfaction: *Reed v. Pruyn*, 7 Johns. 426 [5 Am. Dec. 287].

The injury which might result from the adoption of a different rule is strikingly illustrated in the case which we are considering. The executor of the defendant in the execution, on the production of the receipt given by the sheriff, and the execution with the return of satisfaction indorsed, settled with the person whose note had been taken, as if he had actually paid the money; and after this had been done, when the return had been acted on, and by the death and insolvency of the party whose note had been accepted by the officer in satisfaction of the execution, all recourse upon him has been rendered unavailing, it could not be allowed that, by setting aside his return, the sheriff should avert the consequences of his own act from himself, and throw them on an innocent party. Upon the facts as disclosed by the bill of exceptions, the return could not have been set aside or amended by the sheriff.

That the officer agreed to pay the judgment does not place him in a better condition. We have already shown that the

receipt of the note first taken by him was a satisfaction of the execution as to all but the plaintiff in the judgment. On his motion alone could the return have been set aside; and as between the sheriff and the defendant in execution, the former was bound to pay the amount according to his return. It follows that if the officer was legally bound to pay the amount of the execution, and could neither have set aside nor amended his return, he has received no detriment. He has sustained no legal injury from his engagement not to do the one or to do the other, and the defendant has derived no legal benefit. This principle is fully sustained by authority. It may be conceded that where the consideration is the settlement of a doubtful claim, it is sufficient to sustain a promise: *Longridge v. Dorville*, 5 Barn. & Ald. 117; *Russell v. Cook*, 3 Hill (N. Y.), 504. But where it is clear that there is no liability, there is no consideration; thus, the forbearance to sue where the party is not liable is not a good consideration: *Tooley v. Windham*, Cro. Eliz. 206; *Whorewood v. Shaw*, Yelv. 25; Bayley, J., in *Longridge v. Dorville*, *supra*. So an action does not lie, if a party promise in consideration of a surrender of a lease at will, for the lessor might determine it, unless there was a doubt if it was a lease for will or for years: Com. Dig., tit. Action on the Case, Assumpsit, F, 8.

Neither does the circumstance that the defendant executed the note with a full knowledge of all the facts affect in any manner its validity. The question presented by the charge is solely as to the consideration; and if the evidence shows that the note was without consideration, it could derive no support from the fact that it was made with a full knowledge of the circumstances. It follows, therefore, that the charge of the court was erroneous.

It is, however, insisted by the counsel for the defendant in error that as the consideration of the note was not impeached by a sworn plea, it could not have been inquired into. There was no alteration of the rule of law as respects the consideration of promissory notes, by the statute: Clay's Dig. 340. They imported a consideration: not so with other writings, in which the consideration is required to be proved. The object of the statute was simply to dispense with proof of the consideration in written instruments by making the instrument itself *prima facie* evidence of the debt or duty which it imports to be given for: *Young v. Foster*, 7 Port. 420; *Holman v. Bank of Norfolk*, 12 Ala. 369. None of the decisions, however, go to the extent that unless the plea is sworn to, the consideration can not be inquired into, and the statute referred to only requires a sworn

plea to put in issue the execution of the instrument, but not its consideration.

The decision of the court on these points renders it unnecessary to refer to the other questions presented.

The judgment is reversed, and the cause remanded.

ANY ADVANTAGE TO ONE PARTY OR DETRIMENT TO THE OTHER, however small, is a sufficient consideration to support a promise: *Davis v. Steiner*, 53 Am. Dec. 547, and note.

SHERIFF IS ESTOPPED TO CONTRADICT HIS OWN RETURN: *Boone Co. v. Lowry*, 43 Am. Dec. 532; see also *Doe ex dem. Van Campen v. Snyder*, 32 Id. 311; *McClelland v. Slingluff*, 42 Id. 224.

LANG v. BROWN.

[21 ALABAMA, 179.]

JUDGMENT CREDITOR HAS RIGHT TO PURSUE EQUITABLE ESTATE of his debtor in a court of chancery and have it set apart to the payment of his debt.

INTEREST OF ONE OF SEVERAL CO-DISTRIBUTEES IN INTESTATE'S ESTATE MAY BE CHARGED in chancery, by a judgment creditor, for the payment of his debt; but in order to do this, it is indispensably necessary that the chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate before a final decree can be pronounced condemning such portion to the payment of the demand.

INSTRUCTIONS BY CHANCELLOR TO MASTER ON ORDER OF REFERENCE can not be disregarded by him, and he can not act in opposition to them.

REPORT OF MASTER UNDER ORDER OF REFERENCE by chancellor will not be permitted to stand, where the master disregarded the instructions and directions of the chancellor, and where the report did not furnish the facts necessary to enable the court to proceed to a final decree on the merits of the case, although no exceptions had been taken to it.

COURT CAN NOT MAKE ORDER INCONSISTENT WITH ORIGINAL DECREE. From the time of pronouncing the decree, all the subsequent proceedings should be consistent with it.

DECREE GRANTING MORE EXTENSIVE RELIEF THAN IS PRAYED FOR by the bill or justified by its allegations, and the proof taken under it, is erroneous; therefore, where a bill against the administratrix and distributees of an estate prays a settlement of the estate, an ascertainment of the share of the administratrix, and that this share may be charged with the payment of a debt due complainant, and also that a voluntary deed from the administratrix to the distributees, her children, may be set aside, it is error for the chancellor to direct the defendants generally to pay into court within thirty days the sum reported by a master, to whom the account has been referred, to be due the complainant on his judgment, and in default thereof to direct executions to issue.

VOLUNTARY DEED MADE BY MOTHER TO HER CHILDREN, on a consideration of natural love and affection, at a time when she was indebted to the complainant, is void as to him.

IF ADMINISTRATRIX WASTES ESTATE, the children, the distributees of the estate, have a right to have so much of her portion of the estate appropriated to their own use as will be sufficient to make good any waste or misapplication of assets which has occurred during her administration, and this in preference to the claim of a complainant, a judgment creditor of the administratrix, who is endeavoring to charge her share with the payment of his debt.

THE complainant, a judgment creditor of Mrs. Lang, filed a bill against her in her own right and as administratrix of the estate of Willis Lang, and others, who were the children of Mrs. Lang and the distributees in the estate. The bill charged substantially, that the estate was sufficient to pay off the debts and leave a sum for distribution; that the administratrix had made no settlement of the estate; that the execution on his judgment against Mrs. Lang had been returned "no property found;" the bill further charges that Mrs. Lang had fraudulently conveyed all her interest in the estate to her children, the distributees, and that Mrs. Lang refused to settle in the orphans' court. The object of the bill was to procure a settlement of the estate, to ascertain the share of Mrs. Lang, and to charge it with the payment of complainant's debt, and to set aside the voluntary conveyance of Mrs. Lang to her children. The defendants deny that Mrs. Lang is equitably entitled to any portion of the estate, and allege that she had wasted the assets to an amount largely exceeding her distributive share, and that Mrs. Lang had conveyed her interest to the children to indemnify them from loss. The chancellor held that the lien of the distributees to Mrs. Lang's distributive portion was superior to the complainant's on account of the waste, and offered the complainant to account, to see whether there would be a balance due her after she accounted to the children, but refused to set aside the deed until such an account was taken. The complainant prosecuted a writ of error from this decree, and it was affirmed, and the case sent back for further proceedings. The chancellor then made an order of reference. The order of reference and the decree substantially directed the master to take an account of the estate of Willis Lang, the amount of assets wasted or misapplied by Catherine Lang, the administratrix, of the balance of debt against her and in favor of the estate, and the value she was entitled to as her distributive share, of any payments made by Willis Lang to the complainant, and of the amount due the complainant on his

judgment. The report does not show that the master stated any account current between the administratrix and the estate from the time her administration commenced to the time when the account was taken, so as to show the true condition of the estate; no inquiry was made as to the waste or misapplication of the assets by the administratrix, and no balance was struck between her and the estate, as the order of reference required. The master disregarded these portions of the order of reference. A number of exceptions were taken to the report, which it is unnecessary to notice in detail; the material one being based on the disregard by the master of the chancellor's order. The chancellor overruled the exceptions, and on final hearing the chancellor set aside the deed as fraudulent, and decreed the defendants to pay into court within thirty days, for the use of the complainant, the sum found due him by the chancellor, and in default thereof directed an execution to issue. The defendants brought error.

J. T. Taylor, for the plaintiffs in error.

P. Phillips, *contra*.

By Court, LIGON, J. That a judgment creditor has the right to pursue the equitable estate of his debtor in a court of chancery, and have it set apart to the payment of his debt, is a proposition which, I apprehend, will not now be controverted; and that the interest of one of several co-distributees in an intestate's estate may be thus charged, was settled by this court in this case when it was here at a former term: *Brown v. Lang*, 14 Ala. 719.

But in order to do this, it is indispensably necessary that the chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate before a final decree can be pronounced, condemning such portion to the payment of the demand. To this end the master should take just such an account of the affairs of the administration as is required to be taken by the probate court on the final settlement of intestates' estates; and when this is done, the chancellor should direct the estate to be distributed among the parties in interest, in a manner as nearly conformable to that pointed out by the statute for the government of the probate courts as is practicable, and then direct the sale of so much of the portion sought to be charged by the creditor as shall be sufficient to satisfy his demand.

Such appears to have been the opinion of the chancellor at

the time the reference was made to the master in the case under consideration. It was evidently intended by him that Mrs. Lang (who was at once the widow and administratrix of Willis Lang, deceased, and the judgment debtor of the complainant) should make a full settlement of her administration. Accompanying the order of reference is the opinion of the chancellor (Crenshaw) upon the rights of the parties in several important particulars concerning the account to be taken before the master; and these, so far as they go, should have been regarded by that officer as directions to him in the discharge of his duties under the order. It having been admitted in the answer of Mrs. Lang that she had used and misapplied the assets of the estate, the chancellor directed that an account of the sums so wasted should be taken by the master, and charged upon her portion of the estate when the settlement was made. He declared that the lien of the heirs at law of Willis Lang, deceased, on the distributive portion of the widow, arising out of her waste of the assets of the estate while she was administratrix, was prior and paramount to that of the complainant, which never attached until his bill was filed, and that he could stand in no better position in relation to the distributive portion of the widow than that which she occupied herself. He further declared that the accounts exhibited with the answer of Mrs. Lang were responsive to the bill, and being called for by it they should be received as proof, unless they were surcharged and falsified by other proof before the master. We repeat that these rulings of the court accompanying the order of reference can not be regarded in any other light than express directions to the master to guide him in taking the account. He was not at liberty to disregard or act in opposition to them in stating the account under the order of reference, especially after they had been passed upon by this court, and their correctness sanctioned: *Brown v. Lang*, 14 Ala. 719.

We will now proceed to consider the exceptions taken before the master, and certified by him, with his report, as having been taken by the defendants.

The first three exceptions do not appear to be founded on anything contained in the record, in the report of the master, or any of the exhibits accompanying that report, and were rightly disallowed.

The fourth exception is well taken. Under the order of the chancellor, with the directions preceding it, the master should have made out an account current between the administratrix

and the estate, and in order to do so correctly, it was necessary for him to have ascertained the amount of the debts of Willis Lang which had been paid by the administratrix up to the time the account was taken before him, that this sum might be carried to her credit. The failure to do this was an error, for which the whole report should have been set aside.

The fifth exception is equally well founded, and it was palpable error to disallow it.

The sixth, seventh, and eighth exceptions arise out of the master's disregard of the directions of the chancellor, in reference to the matters involved in them respectively. An examination of the report shows that it is justly obnoxious to each and every one of them, and that it was error to disallow them.

Had no exceptions whatsoever been taken to the report of the master, the chancellor should not have permitted it to stand, for the reasons, first, that the master disregarded the instructions and directions of the chancellor; and secondly, because the report does not furnish the facts necessary to enable the court to proceed to a final decree on the merits of the case. A report which is obnoxious to either of these objections does not require exceptions to set it aside.

It may be remarked with respect to the first of these objections, in the present case, that the report, on its face, shows an utter disregard of the instructions of the chancellor. These directed the master to ascertain and report the amount of waste committed by Mrs. Lang, arising from a misapplication of the assets of the estate in her hands to be administered. Nothing of this kind appears to be done, although the master's attention on the reference was distinctly called to it by the defendant, as appears by the exceptions certified with his report. He refuses also to consider the exhibits attached to the answers of the defendants, which show the property, real and personal, belonging to the estate of Willis Lang, deceased, which came to the hands of the administratrix, with its kind and value, as well as an account of the rents and profits of the estate to the time the answers were filed. The chancellor had directed him to regard these as evidence, unless they were surcharged and falsified, yet he takes it upon himself to say, that he did not regard these portions of the answers as responsive to the bill. It is not allowable for the master to set up his own opinion, on a matter connected with the reference made to him, in opposition to that of the chancellor. His duty is to obey, and if it is desired that the chancellor should review his directions, the party supposing

himself to be aggrieved by this obedience of the master may take exceptions, and by this means bring the point again to the attention of the chancellor. If, on the argument of these exceptions, it should be made to appear that the justice of the case can not be got at without an alteration of the decree in conformity with which the report is made, he will direct the report to stand over, and order that portion of the former decree containing the erroneous directions to be reheard. It is not competent for the court, upon exceptions, to make an order which is not consistent with the original decree; from the time of the pronouncement of that decree, all the subsequent proceedings should be consistent with it: *Daniell's Ch. Pr.* 1499.

In this case, the master has undertaken to do what is not allowed to the chancellor, and that, too, after the action of the chancery court had been reviewed and affirmed by this court. He has reported in direct opposition to the original decree, and an order confirming his report is so great a departure from that decree, and so clear an exercise of unauthorized power on the part of the chancellor, that it may be reviewed in this court, without exceptions taken in the court below.

As to the deficiency of the report, in respect to the facts necessary to enable the chancellor to proceed to a final decree on the merits of the case, it may be said that, with the exception of the sum due the complainant on his judgment, it appears to be total. Neither the report nor the exhibits attached to it show either the condition of the estate, the property, real and personal, belonging to it, subject to distribution, or the shares or portions of the distributees. No account current is made out in that form which would warrant the chancellor in proceeding to a final settlement of its affairs, and a decree of distribution. A report so directly repugnant to the order of reference under which it purports to have been made, and so deficient in those facts upon which the final action of the court could alone be based, need not be excepted to in order to set it aside. In such cases, it is the duty of the chancellor either to direct the master to review his report, in order to conform it to the decree under which it is made, or to disregard it *in toto*, and order him to report under the original decree: 2 *Daniell's Ch. Pr.* 1501; *Turner v. Turner*, 1 *Dick.* 313; *S. C.*, 1 *Swans.* 156.

For another reason, the decree in this case must be reversed. By its terms, the chancellor directs the "defendants" generally, thereby including the children of Willis Lang, deceased, to pay into court the sum reported by the master to be due on the com-

plainant's judgment against Mrs. Lang, within thirty days, and in default of such payment, he directs an execution therefor against said "defendants," in the usual form. The bill seeks no moneyed decree against the heirs at law of Willis Lang, deceased, nor does it, in any of its allegations, lay a predicate which will justify such a decree; neither does the complainant pretend to have any demand against them. It is true, he alleges that Mrs. Lang has made to them a voluntary deed for her portion of the estate, which he insists is fraudulent as to him; but he seeks to set this deed aside altogether, and does not seek to charge the property conveyed by it in the hands of the grantees, or to have them declared trustees of her interest, for his benefit. His whole object seems to be to disincumber Mrs. Lang's portion, and have it set apart for the satisfaction of his judgment against her. The children of Willis Lang, deceased, are made parties, for the purpose of effecting a final settlement of the estate, in which they had a joint interest with their mother; and because they are the grantees in a deed, made by Mrs. Lang, which is alleged to be fraudulent as to the complainant.

For these purposes they were not only proper but necessary parties to the bill, and the only relief sought against them is the prayer that the deed made to them by their mother be set aside for fraud. A decree which, like the present, grants more extensive relief than is prayed for by the bill or justified by its allegations and the proof taken under them is erroneous. Again, the decree in its present form is inoperative. It is shown by the proof that neither Mrs. Lang nor her children have any property, apart from their interest in the estate of Willis Lang, deceased; this is not subject to levy and sale for the debts of any or all of them, under execution on a moneyed decree, so long as the estate remains unsettled in the hands of the administratrix; such an execution is as powerless to charge the property as the one which issued on the judgment at law. To render the decree operative, it was indispensable to separate Mrs. Lang's portion from the portions of her children; and to do this, a final settlement of the administration and a distribution of the personalty were both necessary; neither of which has been effected here.

The deed made by Mrs. Lang to her children, purporting to convey all her interest in her husband's estate, is, on its face, made upon consideration of natural love and affection, and none other is established by proof. It is voluntary, and being made

at a time when she was indebted to the complainant, it is therefore void as to him, and was rightly set aside. This, however, can not affect the right of the children to have so much of her portion of the estate appropriated to their own use as will be sufficient to make good any waste or misapplication of assets which has occurred during her administration; and this in preference to the claim of the complainant. She could not be permitted to receive any part of the estate in her own right while she was a debtor to the trust fund for moneys appropriated from that fund to her own use; neither can the complainant, who occupies her position to the extent of his demand against her, be allowed to do so.

It is proper here to remark, that in the second head-note prefixed to the case of *Brown v. Lang*, 14 Ala. 719, in which it is said that this court "held, that in the absence of fraud the co-distributees had, under the deed, a prior lien on the share of the administratrix, as distributee, to the lien of the creditor," the reporter was betrayed into a misapprehension of what was really decided by the court. No question could properly have arisen in that case, in this court, on the validity or invalidity of the deed, or its legal effect, for the obvious reason that no opinion had been expressed on this branch of the case in the court below; but it was distinctly reserved by the chancellor until the coming in of the master's report, and consequently was not here for revision. In the opinion of the court it is said: "We may then place out of view the deed, without stopping to inquire whether it can be supported by proof of valuable consideration, and rest the decree of the chancellor upon the paramount lien of the co-distributees of the intestate's estate, upon the share of Mrs. Lang." This explanation I esteem due to the court, to prevent the inference which might otherwise be drawn, of a conflict between our decision then and now in reference to the deed from Mrs. Lang to her children. So far from a conflict, the harmony is complete, since both decisions proceed upon precisely the same principles in setting up the prior equity of the distributees.

The master's report must be set aside, and the decree reversed at the cost of defendant in error. The proceedings, up to the order of reference, are regular and without error; the cause must therefore be remanded, with directions that it be taken up at that point and proceeded in to a final decree, on the principles laid down in this opinion, and the opinion of the chancellor accompanying the order of reference.

TRANSFER OF PROPERTY BY PARENT TO CHILD, WHEN FORMER IS INDEBTED, EFFECT OF: See *Forsyth v. Matthews*, 53 Am. Dec. 522; *Fleming v. Townsend*, 50 Id. 318; *Gaines v. Gaines*, 48 Id. 425; *Hugh v. Nelms*, Id. 103.

CLAIMS AGAINST WHICH VOLUNTARY CONVEYANCES MAY BE AVOIDED: See the note to *Greer v. Wright*, 52 Am. Dec. 111, discussing this subject.

CREDITOR OF INTESTATE MAY MAINTAIN EQUITABLE ACTION to recover his claim against the heirs of the intestate to whom his estate has descended, although there has been no administration of such estate: *Shannon v. Dillon*, 48 Am. Dec. 394.

JUDGMENT CREDITOR MAY FILE BILL TO SUBJECT EQUITABLE INTEREST of his debtor to the payment of his debt: *Dargan v. Waring*, 46 Am. Dec. 234.

ANDREWS' HEIRS *v.* BROWN.

[21 ALABAMA, 437.]

WHEN PARTNERSHIP IS DISSOLVED BY DEATH of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested in the survivor exclusively, for the purpose of paying the debts and then dividing the net balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken had he been in life and the firm had been dissolved, not by death, but by mutual consent.

REAL ESTATE BELONGING TO FIRM IS CONSIDERED AS PERSONAL PROPERTY in equity, to the extent that it is liable to pay the debts of the firm and then to distribution between the partners, in the same manner as if it had been personal instead of real estate.

CLAIM OF CREDITORS OF FIRM TO PARTNERSHIP REALTY is superior to a wife's right of dower and to the legal title of the heirs at law of a deceased partner.

HEIR OF DECEASED PARTNER HOLDS LEGAL TITLE TO REAL PROPERTY belonging to the firm, subservient to or in trust for the surviving partner, who is charged with the payment of the debts.

SURVIVING PARTNER HAS RIGHT IN EQUITY TO DISPOSE OF REAL PROPERTY belonging to the firm for the payment of the debts, where the firm is insolvent, and the deed will convey the equity of the heir of a deceased partner, who may be compelled to make a conveyance.

LAND STANDING ON BOOKS OF OLD PARTNERSHIP AS PARTNERSHIP PROPERTY, and carried into a new firm formed from the old as a part of its capital, is partnership property of the new firm.

BILL by Thomas Brown, the surviving partner of the firm of E. L. Andrews & Co., against the representatives and heirs of E. L. Andrews and Z. Andrews, the deceased partners, for the purpose of obtaining control of certain stock and real estate standing in the name of the deceased partners, and subjecting it to the partnership debts. The bill alleged that the property, although standing in the names of the defendants individually, was partnership property, and also the insolvency of the firm.

The property had belonged formerly to a firm composed of E. L. and Z. Andrews, and when the firm with Brown as a member was formed, the land was carried into the new firm and became part of the capital. A supplemental bill was filed, stating that part of the real estate had been purchased by E. L. Andrews for the firm at a foreclosure sale, and the property had been redeemed and the money paid to Campbell & Chandler, attorneys for the deceased partners, and prayed that this be decreed to stand in place of the land itself. The chancellor decreed in favor of the complainant. Defendants brought error.

P. Phillips, for the plaintiffs in error.

John A. Campbell and P. Hamilton, contra.

By Court, DARGAN, C. J. When a partnership is dissolved by the death of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested exclusively in the survivor; not, indeed, for his own peculiar benefit, but for the purpose of paying the debts, and then dividing the net balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken had he been in life, and the firm had been dissolved, not by death, but by mutual consent. But as respects real property, the case is different at law; for the legal title descends to the heir at law of the deceased partner, and a court of law, looking to the legal title alone, can not regard or protect the mere equities of others. In a court of equity, however, real estate belonging to the firm is considered as personal property, to this extent, at least, that it is liable to pay the debts of the firm, and then to distribution between the partners in the same manner as if it had been personal instead of real estate. These charges upon the real estate, being prior to the claims of the representatives of the deceased partner, override his wife's title to dower, as well as the title of his heir at law. The consequence is, that the heir at law holds the legal title subservient to or in trust for the surviving partner, who is charged with the payment of the debts. These principles of law, in my opinion, are so well settled that they are no longer the subject of controversy: Story on Part. 127 et seq.; Coll. on Part., Perkin's ed., 183-145; *Pugh v. Currie*, 5 Ala. 446; *Pierce v. Trigg*, 10 Leigh, 406; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Dyer v. Clark*, 5 Met. 562 [39 Am. Dec. 697]; *Ripley v. Waterworth*, 7 Ves. 425; *Dale v. Hamilton*, 5 Hare, 369.

Inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying those debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose; for it would never do to charge him with the duty of paying the debt, and at the same time to take from him the means of doing it. Therefore, although he can not by his deed pass the legal title to the purchaser, which descended to the heir of the deceased partner, yet, as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey this equity to his purchaser, and through it he may call on the heir for the legal title and compel him to convey: See *Delmonico v. Guillaume*, *Dyer v. Clark*, *supra*.

Applying these principles to the facts exhibited by the pleadings and proof in the case before us (but which we will not state in detail in this opinion), we can perceive no error in the decree; for the proof, we think, is abundant to show that, although the legal title to the lands was held by E. L. Andrews alone, nevertheless they belonged to the firm as partnership property, and were so treated by all the members of the firm. They never did belong exclusively to E. L. Andrews; consequently the claims of the creditors of the firm are superior to his widow's right of dower as well as to the legal title of his heirs at law. The lands were purchased with the funds of E. L. & Z. Andrews, who were then partners, and stood upon their books as partnership property, and when the new firm was formed, composed of E. L. and Z. Andrews and Thomas G. Brown, these lands were carried into the new firm as part of its capital, and were therefore partnership property.

As to the stocks purchased with the funds of the new firm, it is very clear that they also are subject to the control and disposition of the surviving partner, Brown, notwithstanding they stand on the books of the bank and the insurance company in the name of E. L. Andrews alone. In reference to the money received by Messrs. Campbell & Chandler, growing out of the redemption of one of the lots by Mr. Gliddon, we think it should stand in the place of the lot itself, and consequently subject to the disposition made by Brown of the lot.

We are satisfied there is no error in the decree, and it must be affirmed.

I will observe, in conclusion, that we do not intend, by anything said in the foregoing opinion, to hold that a surviving

partner is authorized to sell real estate for the simple purpose of making distribution amongst the partners themselves and their representatives. That question is not raised in the case, and has not been considered; we only intend to decide this: the firm being insolvent, the surviving partner may dispose of the whole property to pay the debts, whether that property consists of real or personal estate.

The decree is affirmed.

PARTNERSHIP DISSOLVED BY DEATH OF ONE OF THE PARTNERS, the legal title to all the choses in action which belonged to the partnership becomes vested in the survivor, and the settlement of the partnership devolves on him: *Kinsler v. McCants*, 53 Am. Dec. 711.

PARTNERSHIP REALTY, WHEN TREATED AS PERSONALTY, AND LIABILITY OF, FOR DEBTS: See *Buchan v. Sumner*, 47 Am. Dec. 305, and note.

WIDOW ENTITLED TO DOWER IN PARTNERSHIP REALTY, when, and when not: See *Markham v. Merrett*, 40 Am. Dec. 76; *Dyer v. Clark*, 39 Id. 697; *Greene v. Greene*, 13 Id. 642.

HUBER v. ZIMMERMAN.

[21 ALABAMA, 488.]

AGENT CAN NOT SUBMIT TO ARBITRATION an account which he is merely authorized to settle, and the award is not binding on the principal.

ERROR to the Mobile circuit court. The opinion states the case.

Percy Walker, for the plaintiff in error.

George N. Stewart, contra.

By Court, CHILTON, J. This was an action commenced by attachment at the suit of the plaintiff in error against the defendant, to recover the sum of seven hundred and twenty-five dollars and eighty-one cents, that being the sum alleged to have been awarded the plaintiff by certain persons chosen by the parties to arbitrate the matters of difference between them in respect to their mutual accounts.

It appears from a bill of exceptions signed upon the trial, that the defendant, residing in the city of Philadelphia, and being unable, as he supposed, to effect a settlement with the plaintiff, who resided at Mobile, sent his son to Mobile in order to settle the matter of indebtedness between them. The authority to the son was contained in the following extract from a letter written to the plaintiff: "You say that I have sent my son to

settle with you, and that he knows nothing of the affairs; but he can settle with you as well as I or any other man who knows how to count. If you will do what is right, and have your affairs so plainly written down and entered into the book as I have done mine, then it is easy to settle. I do not keep my business in my head, but in my book. I would not have sent my son if you had done what was right, or were a man of your word."

Under this authority the son submitted the matters of account to arbitration by an agreement with the plaintiff, and the arbitrators having found his father debtor to the amount sued for, he (the son) expressed himself satisfied with the award.

The court ruled that the letter above referred to gave to the son no authority to submit the accounts of his father to arbitration, and that the award, although consented to by him, was not binding on the principal. This, it is here insisted, was erroneous.

In *Scarborough v. Reynolds*, 12 Ala. 252, this court held that an authority given to an agent in these words, "If you can honorably and fairly settle with Reynolds for me, out of court, do so; if not, let the court and jury settle," did not authorize the agent to make a reference to arbitrators, although the agent was further empowered to exercise a reasonable discretion, and to submit to reasonable sacrifice in order to effect a settlement.

The authority conferred upon the agent to make settlement, etc., was a personal trust, given, it may be, solely in view of the agent's capacity for its performance. The law is well settled, that in such case, unless an authority is expressly given to substitute, the agent has no power to put another in his place and stead: *Story on Agency*, 14, sec. 13. Some exceptions, or rather qualifications, in the application of this general rule, have sometimes been allowed in cases where, from the language used, or from a fair presumption growing out of the nature of the business to be transacted, or the usage of trade, it appears that a broader power was intended to be conferred on the agent.

But it is needless to pursue this subject. The case first cited, of *Scarborough v. Reynolds*, in our opinion, goes far beyond this as to the general scope of the power conferred, and is decisive of the question involved in this adverse to the plaintiff in error. The authority cited from *Henley v. Soper*, 8 Barn. & Cress. 16, does not militate against the view here taken; for the power of substitution was there given.

Let the judgment be affirmed.

POWER OF AGENT TO SUBMIT TO ARBITRATION: See the note to *Hutchins v. Johnson*, 30 Am. Dec. 626; *Carnochan v. Gould*, 19 Id. 668.

WHO MAY SUBMIT TO ARBITRATION WHEN ACTING FOR ANOTHER, generally: See the note to *Hutchins v. Johnson*, 30 Am. Dec. 622, discussing this subject.

SIMMONS v. BULL.

[21 ALABAMA, 501.]

FATHER IS UNDER NO LEGAL OBLIGATION TO SUPPORT BASTARD in the absence of a statute.

BILL FILED BY BASTARD AGAINST FATHER, alleging that the defendant had removed beyond the jurisdiction of the state to avoid the statutory liability for his support, leaving property in this-state, and praying that a publication may be made, and that provision may be made for his support, can not be sustained.

ERROR to the St. Clair chancery court. The opinion states the case.

Rice and Morgan, for the plaintiff in error.

Walker and Martin, contra.

By Court, CHILTON, J. This was a bill filed by an infant by its next friend, charging that it was a bastard, begotten by the defendant, who, to avoid the statutory liability for its support, has removed beyond the jurisdiction of this state, leaving property belonging to him in the county of St. Clair. The bill prays that publication may be made, and that provision may be made for the support of the infant out of the property of the defendant. The chancellor dismissed the bill for want of equity.

At the common law, a bastard was said to be *filius nullius*. His natural father may die never so rich, and he may be upon the parish, yet he took none of his estate, unless left to him by will. In the absence of a statute, the father is under no legal obligation to support him; and the statute prescribes the mode, and the only mode, by which this support can be obtained. The case before us shows the necessity for further legislation on the subject. Our duty, however, is plain; as we have no power to make but only to administer the law, and as there is no provision of either the common or statute law authorizing this proceeding, the chancellor properly dismissed the bill, and his decree must consequently be affirmed: See *Furillio v. Crowther*, 16 Eng. Com. L. 302; *Moncrief v. Ely*, 19 Wend. 405; 2 Kent's Com. 215.

Decree accordingly.

POLICY OF ANCIENT COMMON LAW TOWARDS BASTARDS, AND RIGHTS OF, GENERALLY.—Bacon, in his Abridgment, title Bastardy, well expresses the policy of the ancient common law towards this unfortunate class in society. He there says: "All well-regulated governments have laid down and settled certain rules of propagation, as necessary to the very being of human society. Hence the solemnity of marriage was established, not only as it prevents lewdness, but as a regulation without which there could be no distinction of families, and consequently no encouragement for industry, or foundation for acquiring riches; the children therefore that are born in these societies, and are to enjoy any privileges by the laws, must be such as are born according to their rules of copulation; for it is absurd that the laws should give sanction and privilege to things done contrary to the law, since that would take away the distinction of right and wrong, lawful and unlawful; and therefore bastards under our law lie under several disabilities." And continuing, he says: "In ancient days bastardy was so disgraceful that to retain a bastard in a man's house was a reflection, and the stain and reproach of the parents. Crime dwelt always upon the issue so that he could not be admitted to feudal service; and therefore, when the bishops requested that our law should be changed in the particular of bastard *eignes*, the statute says that all the barons and earls answered, *Una voce nolumus leges Angliæ mutare.*" They were treated by the common law with great strictness, and were allowed but few privileges. As Blackstone says: "The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi.*" The severity of the rules of the ancient common law has, however, been relaxed in all of the American states and in England, and bastards now have rights which were unknown to them at the common law. "This relaxation in the laws of so many states, of the severity of the common law, rests upon the principle that the relation of parent and child which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity:" 2 Kent's Com. 213.

CUSTODY OF ILLEGITIMATE CHILDREN.—The mother, as the natural guardian of an illegitimate child, has a right to the custody and control of a bastard: *Wright v. Wright*, 2 Mass. 109; *Carpenter v. Whitman*, 15 Johns. 208; *People v. Landt*, 2 Id. 375; *Commonwealth v. Fee*, 6 Serg. & R. 255; *Hudson v. Hills*, 8 N. H. 417; *Matter of Doyle*, 1 Clarke, 154; *People v. Kling*, 6 Barb. 366; *Robalina v. Armstrong*, 15 Id. 247; and in preference to the father, although from his circumstances he may be better able to educate him: *Ex parte Knee*, 1 B. & P. N. R. 148; and if the putative father obtain possession of the child from the mother by fraud, the court will order it to be restored to the mother: *Rex v. Soper*, 5 T. R. 278; *Rex v. Moseley*, 5 East, 224, note; and the court will grant a *habeas corpus* to bring up the body of a bastard child within the age of nurture for the purpose of restoring it to the custody of the mother, from whose quiet possession it has been taken at one time by fraud, and afterwards by force; and this without prejudice to the question of the guardianship: *Rex v. Hopkins*, 7 Id. 579; and a father who has legitimated the child, under the Tennessee statute of 1805, is not in consequence thereof entitled to its custody; and the county court has no authority to put it into his custody, or to bind it out against the mother's wishes, unless it is a pauper: *Lawson v. Scott*, 1 Yerg. 92; and the mother being entitled to the custody, in the absence of legal reasons to the contrary, the ordinary can not, without such reasons, bind out the child to apprenticeship to another: *Alfred v. McKay*, 36 Ga. 440; and on

an appeal from a hearing on a petition for a *habeas corpus* by the mother to recover the possession of the child from one to whom the child had been apprenticed by an orphan asylum, after the mother had voluntarily abandoned him, the evidence showing that both the relatrix and the defendant were proper persons to have the custody of the child, it was held that the judgment for the relatrix should not be disturbed, although the judge's finding did not include the age of the child: *Copeland v. State*, 60 Ind. 394; but on a child between eleven and twelve years of age being brought before a court on a *habeas corpus* by the mother to obtain possession, the court declared the child to be entitled to exercise her own discretion as to whether she would go, and would not allow the mother to take her against her will: *In re Lloyd*, 3 Man. & G. 547. On the application by a father for the custody of his illegal child, if it appears that his moral character was no better than that of the mother, and that she had a natural affection for the child, neither neglecting, abusing, nor failing to provide for it, the custody of the child will not be awarded to him: *Pratt v. Nitz*, 48 Iowa, 33; but the father is generally entitled to the custody of a child as against all but the mother; and if she is dead, and he is a suitable person, it shall be taken from the maternal grandmother and be delivered to him: *Commonwealth v. Anderson*, 1 Ashm. 55; and by the Georgia code, the marriage of the mother and the reputed father of the child legitimates the child, and subjects him to the custody and control of the father: *Adams v. Adams*, 36 Ga. 236. And a father who, after the death of the mother, has by authentic act legitimated his natural child, may, on showing that he has treated the child with ordinary care, and has means to support and educate her, recover her from a dative tutor appointed to her as a foundling: *Matter of Celina*, 7 La. Ann. 162. A gift, in consideration of the release of a debt, made by a servant to her master, of her illegal child, of which he was the father, that he might maintain and educate such child "as a legal father," gives him no right to treat the child as a peon; and when the mother of such a child held as a peon by a stranger sues out a writ of *habeas corpus* to obtain the custody of it, the rejection of evidence of her unfitness to have the custody is not error as against the defendant, such evidence not being material to the issue between the parties; and testimony of the child in such a case, that she is willing to remain in the defendant's service, is not satisfactory evidence: *Bustamento v. Analla*, 1 N. M. 255. The surety on a bond given by the father to maintain a bastard child has no more right to the custody of the child than any other stranger: *Falls v. Belknap*, 1 Johns. 486.

MAINTENANCE OF BASTARD CHILDREN.—The mother is the natural guardian of a child, and is bound to maintain it: *Wright v. Wright*, 2 Mass. 109; *Carpenter v. Whitman*, 15 Johns. 208; *People v. Landt*, 2 Id. 375; *Commonwealth v. Fee*, 6 Serg. & R. 255; *Hudson v. Hills*, 8 N. H. 417; *Matter of Doyle*, 1 Clarke, 154; *People v. Kling*, 6 Barb. 366; *Robalina v. Armstrong*, 15 Id. 247; *Nine v. Starr*, 8 Or. 49; but it was held in *Ruttinger v. Temple*, 4 B. & S. 491, that there was no obligation upon the personal representatives of the mother of a bastard child to expend money or property which belonged to the mother in the maintenance of such child. At the common law, a father was under no obligation to support his bastard child. The only mode by which his support can be obtained from the father is prescribed by statute: *Simmons v. Bull*, 21 Ala. 501 (principal case); and see, on this point, *Marlett v. Wilson*, 30 Ind. 240; there is no implied promise from the father to the mother to furnish it a support: *Wiggins v. Keizer*, 6 Id. 252; and the child has no lawful claim on the estate of the deceased father for support: *Dalton v. Halpin*, 27 La. Ann. 382; and even verbal directions of a father, that the child shall be sup-

ported out of his estate after his death does not give the child a right of action against his father's administrator: *Duncan v. Pope*, 47 Ga. 445; but if a father has adopted the child as his own, although no order has been made on him, he is liable for the nursing and expenses: *Hesketh v. Gowling*, 5 Esp. 131. In most of the states of the Union and in England statutes have been passed for the affiliation of bastard children and to charge the father with their support. This subject is treated of at length in the note to *Weatherford v. Weatherford*, ante, p. 206, to which the reader is referred. In Louisiana as well, the father of an illegitimate child may be sued by the mother for alimony for its support: *Gibney v. Fitzsimmons*, 5 La. Ann. 250; but no greater alimony will be granted there than is shown to be necessary at that time for its support; and should a larger sum afterwards become necessary, it is within the province of the probate court to grant an addition: *O'Gara v. Riddell*, 19 Id. 504; and see *Drouet v. Succession of Drouet*, 26 Id. 323, for a further illustration of this proceeding. In *Nine v. Starr*, 8 Or. 49, it was held that a promise by the putative father to board and clothe the child was without consideration and could not be enforced; but it is established as a rule by the weight of authorities in England at least, that promises by the putative father to pay the mother a certain amount, on consideration that she would support and maintain the child, are binding: *Hargroves v. Freeman*, 12 Ga. 342; *Jennings v. Brown*, 9 Mee. & W. 496; *Smith v. Roche*, 6 C. B., N. S., 223; *Hicks v. Gregory*, 8 C. B. 378. A woman who at the request of her seducer has taken lodgings and laid out money in necessities for her confinement and in support of the child is entitled to sue him for the money paid: *Gore v. Hawsey*, 3 F. & F. 509. If the father promise the mother that if she would abstain from affiliating the child he would pay her a certain sum weekly, and she suffers the time limited for affiliation to expire, the promise is binding: *Linnegar v. Hodd*, 5 C. B. 437; as is a promise to pay the mother a certain annuity if she should not require the custody and management of several illegitimate children he had borne by her: *In re Plaskett*, 30 L. J. Ch. 606; and if the father has consented to pay an annual amount for the support of the child, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to discontinue the payment of such annual sum: *Cameron v. Baker*, 1 Car. & P. 268; and see *Nichole v. Allen*, 3 Id. 36. Bankruptcy is no discharge of a promise to allow a weekly sum for the child's support: *Millen v. Whittenbury*, 1 Camp. 428; nor can a putative father and surety exonerate themselves from a bond given for the maintenance of the child by demanding it of the mother and offering to support it: *Carpenter v. Whitman*, 15 Johns. 208; but where a father makes several payments for the child's maintenance and then refuses to continue its support until the mother has obtained an order of affiliation, no right of action will lie by the mother for the arrears of the maintenance: *Furillio v. Crowther*, 7 Dow. & Ry. 612. An agreement by the father to pay the mother a certain sum yearly by quarterly installments as long as she should maintain and educate their six illegitimate children, varying in age from seven to fourteen years, is an agreement indefinite as to time, and revocable at the will of either party at any time with reasonable notice, and need not be in writing: *Knoulman v. Bluet*, 29 L. T., N. S., 462; S. C., 22 Week. Rep. 77; but a contract to support a child six years of age "till it should be able to do for itself" is within the statute of frauds and must be in writing: *Farrington v. Donohoe*, 14 Id. 922. Where the father of two illegitimate children executed a bond conditioned for the payment of an annuity for the support of them and their mother during their joint natural lives, or in case of the death of the children, during the natural life of the mother, and one of the children

died, it was held that the executor of the obligor was liable on the bond for the arrears of the annuity accruing after the death of the child: *James v. Tallent*, 1 Dow. & Ry. 548.

RIGHTS OF INHERITANCE.—a. *Rules of Common Law as to.*—Blackstone says: “The incapacity of a bastard consists principally in this, that he can not be heir to any one, neither can he have heirs but of his own body; for being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.” 1 Bla. Com. 569. And in volume 2, page 247, he says: “Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either within lawful wedlock or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *Qui en damnato coitu nascitur, inter liberos non computantur*. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser, and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also, if the father had no lawful wife or child, then even if the concubine was never married to the father, yet she and her bastard son were each entitled to one twelfth of the inheritance; and a bastard was likewise capable of succeeding to the whole of his mother’s estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law in favor of marriage is much less indulgent to bastards.” As has been said before, the stringency of these rules has been much relaxed, and bastards are now allowed certain rights of inheritance denied them at the common law. We will proceed to consider these rights.

b. *Law of Place of Birth, Effect of, on Rights of Illegitimates.*—When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the state or country where such marriage took place and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that *status*, including the right to inherit: *Miller v. Miller*, 91 N. Y. 315. The same principle was in effect decided in *Succession of Caballero*, 24 La. Ann. 573; and in *Smith v. Kelly’s Heirs*, 55 Am. Dec. 87, it was held that a child illegitimate in the place of its birth was incapable of inheriting in another state to which its parents removed, although, had it been born in the latter state, it could have inherited. Indeed, it is a principle recognized as sound by the most eminent jurists, that the *status* or condition as to legitimacy is to be determined by the law of the place where the child was born: See Story’s Conf. L., sec. 87 et seq. But although the legitimacy of a child is determined by its domicile, and its legitimacy is recognized elsewhere as so determined, still the right of a child to inherit in a country is not concluded by the fact that such child has been legitimated in the country of its domicile. Thus an illegitimate child legitimated by the laws of another state can not inherit in Pennsylvania: *Smith v. Derr*, 34 Pa. St. 126; or in Alabama: *Lingen v. Lingen*, 45 Ala. 410. And a child born in Scotland, of parents domiciled there, but not married until after his birth, although legitimated by the laws of Scotland, can not take real estate in England as heir: *Doe d. Burtwhistle v. Vardill*, 6 Bing. N. C. 385; nor if in such a case the son died leaving land in England could the father inherit it: *In re Don*, 4 Drew. 194. In *Doe d. Burtwhistle v. Vardill*, Tindal, C. J., said: “The grounds and foundation upon which our opinion rests are briefly these: that we hold it to be a

rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother. This is a rule *juris positivi*, as are all the laws which relate to the succession of real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and the canon law, by which the subsequent marriage between the father and the mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, can not be broken in upon or disturbed by the law of the country where the claimant was born—and which may be allowed to govern his personal *status* as to legitimacy—upon the supposed ground of the comity of nations." In *In re Wright*, 2 Kay & J. 595, a domiciled Englishman being the father of an illegitimate child, born in France of a French woman, afterwards became domiciled in France, and it was held that he could not, on his subsequent marriage with the mother of the child, legitimize the child under the provisions of the French law, so as to enable it to share in a bequest to his children contained in the will of a person in England; and for the following reasons: 1. That marriage, being a personal contract, is regulated by the law of the domicile; 2. That the law of the domicile of the putative father attached to the child at its birth, and by that law its bastardy was indelible; 3. That by the law of France a bastard can not afterwards be made legitimate, if at the time of its conception the parents were incapable of contracting to legitimize the child after its birth; and a domiciled Englishman could not bind himself by such a contract; 4. That by the law of France, a bastard can never be made legitimate if it is uncertain who was the father; and a domiciled Englishman can not by the law of this country, for civil purposes, be more than the putative father of a bastard child.

c. *Adoption or Acknowledgment of Child by Father, or Legitimation of It by Statute, Effect of.*—The adoption of an illegitimate child by the putative father, pursuant to the Vermont general statutes, c. 56, sec. 6, providing that "the child shall thereafter be considered, as respects such father, legitimate and capable of inheriting, and the same rights, duties, and obligations shall exist between such father and the child as if the child were born in lawful wedlock," does not render such child capable of inheriting as the legal representative of such father, but only legitimates it as respects the father: *Safford v. Houghton*, 48 Vt. 236; loose acts of recognition will not be sufficient to establish an adoption by the testator so as to entitle the child to a share of his estate: *Sbarbor's Estate*, Myrick's Prob. 255. A Maryland statute providing that if a man have a child by a woman whom he afterwards marry, and acknowledge the child, that he will in consequence be legitimated, was held not to be limited to children of those who were capable of contracting lawful marriage, but extended to the issue of an adulterous connection: *Hawbecker v. Hawbecker*, 43 Md. 516; the written acknowledgment by which a bastard child is rendered legitimate must be drawn for that express purpose, and conform strictly to the statute: *Pina v. Peck*, 31 Cal. 359; although under the Iowa code it was held it need not be formal, but might be by letters: *Crane v. Crane*, 31 Iowa, 296. Under a Maine statute providing that a bastard became heir of a father who acknowledged him by a writing signed before a witness, but further provided that he could not take by representation unless the parents married and had other offspring, and unless the father afterwards acknowledged him as aforesaid or adopted him into the family, it was held that where the intermarried adopted the

bastard, and had other offspring, so as to entitle him to take, by representation, but did not acknowledge the relationship in writing, he could not take as heir of his father: *Hunt v. Hunt*, 37 Me. 333. Where for thirty years no legitimate heirs are shown to exist, or, if in existence, have presented no claim to a succession, the duly acknowledged natural children may prosecute any claims thereto: *Remy v. Municipality No. 2*, 11 La. Ann. 148. Natural brothers and sisters will exclude a natural daughter not acknowledged: *Dupre v. Caruthers*, 6 Id. 156. The legislature has power to remove the legal taint of bastardy either by a general or special law for all purposes of future inheritance: *McGunnigle v. McKee*, 77 Pa. St. 81; *Killam v. Killam*, 39 Id. 120. But an estate already descended to the legal heir can not, by a subsequent act of legitimation, be divested and given to a bastard: *Killam v. Killam*, *supra*. The averment of parentage in a legislative act legitimating a child is *prima facie* evidence of its truthfulness: *McGunnigle v. McKee*, 77 Id. 81; and where, under the Tennessee act of 1805, c. 2, the name of an illegitimate child was proved to have been changed on the application of the putative father, but the record of the court was destroyed, it was held that the child must be presumed to have been made an heir, and was entitled to his father's estate: *McReynolds v. McCallie*, 1 Lea, 260; a private act declaring a bastard to be legitimate and to be the heir and next of kin of a particular person, by implication excludes the idea of his being the lawful heir or next of kin of any other person: *Lee v. Shankle*, 6 Jones L. 313; and a bastard made capable, by act of the legislature, of inheriting from his father can not inherit from his stepmother: *Drain v. Violet*, 2 Bush, 155; and a special act making A. the heir of S. in as full and perfect a manner as if she had been born in lawful wedlock, gives A. no right to any share in the estate of a brother of S., who died intestate after S., and from whom S. would have inherited had she been living: *Moore v. Moore*, 35 Vt. 98. And when a bastard is legitimated by statute, the statute operates only to give him inheritable capacity, and does not release his liability for collateral inheritance taxes unless the legislative intent to do so is clearly expressed: *Physick's Estate*, 2 Brews. 179.

d. *Right of Bastard to Inherit from or through his Mother.*—Almost the first innovation made on the old common-law rules concerning the rights of bastards was to allow bastard children and their mother to respectively inherit from each other. Bastards are now generally allowed this right of inheritance: *Alexander v. Alexander*, 31 Ala. 241; *Stover v. Boswell*, 3 Dana, 233; *Jackson v. Collins*, 16 B. Mon. 214; *Opdyke's Appeal*, 49 Pa. St. 373; *Neil's Appeal*, 92 Id. 193; and the fact of her death before the descent cast will not prevent the child from inheriting her share of an estate: *McGuire v. Brown*, 41 Iowa, 650; and a child begotten of a mother who had married in good faith and before any doubt had arisen in her mind as to the existence of any legal impediment to her marriage is entitled to all the rights of a legitimate heir of the mother: *Harrington v. Barfield*, 30 La. Ann., pt. 2, 1297. A bastard born of a slave mother need not have been legally acknowledged by her mother to enable her when emancipated to inherit from her: *Neel v. Hibard*, Id. 808. In California if a testatrix in her will omits to provide for her illegal child, the child inherits as a pretermitted child: *Wardell's Estate*, Myrick's Prob. 224; S. C., 57 Cal. 484; in Massachusetts, however, it was held that a child so unintentionally omitted was not entitled to the share of the estate she would have taken under their statute had the mother died intestate: *Kent v. Barker*, 2 Gray, 535; but under a devise or remainder to a mother for her life, and then over to her lawful issue, illegit-

imate children of the mother can not take: *Black v. Cartmell*, 10 B. Mon. 188; *Gibson v. Moulton*, 2 Disney, 158. An illegitimate child can not inherit through his mother in Kentucky: *Jackson v. Jackson*, 78 Ky. 390; S. C., 39 Am. Rep. 246; or in Tennessee: *Brown v. Kerby*, 9 Humph. 460; *In re Mericlo*, 63 How. Pr. 62; but the contrary rule prevails in Indiana: *Doe v. Bates*, 6 Blackf. 533; and in North Carolina, *Waggoner v. Miller*, 4 Ired. L. 480, it was held that where A., the mother of an illegitimate child, died before B., the mother's father, the child was entitled to part of the estate of B.

e. *Right of Bastard's Brothers or Sisters to Inherit from or through Each Other*.—As a general rule, bastard children of the same mother are allowed to inherit from each other: *Brown v. Dye*, 2 Root, 280; *Flintham v. Holder*, 1 Dev. Eq. 345; *Brewer v. Bloogher*, 14 Pet. 178; *Burlington v. Fosby*, 6 Vt. 83; *Hepburn v. Dundas*, 13 Gratt. 219; *Briggs v. Greene*, 10 R. I. 495; *Rogers v. Weller*, 5 Biss. 166; *Riley v. Byrd*, 3 Head, 20; *McBryde v. Patterson*, 78 N. C. 412; *Estep v. Mackay*, 52 Md. 592; *Miller v. Williams*, 66 Ill. 91; *Garland v. Harrison*, 8 Leigh, 368. The contrary rule prevails in Pennsylvania: *Woltemate's Appeal*, 86 Pa. St. 219; *Ditsche's Estate*, 11 Phila. 15; and in Kentucky it has been held that bastard brothers do not inherit from each other, the mother being dead: *Allen v. Ramsey*, 1 Metc. (Ky.) 635. And illegitimate children can not inherit from legitimate children by the same mother: *Bacon v. McBride*, 32 Vt. 585; *Woodward v. Duncan*, 1 Coldw. 562. Nor can a bastard claim through sisters any part of her son's estate, the Massachusetts statutes of descents allowing him to take only through his own mother and her lineal descendants: *Haraden v. Larrabee*, 113 Mass. 430. Where a testator's estate was claimed by his half-brothers by the same father and his half-sisters by the same mother, all the parties being illegitimate, it was held that the half-brothers could take nothing, as the father of the illegitimate children could not inherit nor be a conduit, and that the half-sisters being heirs of their mother, and she being dead, they were entitled to the estate: *Harrison's Estate*, Myrick's Prob. 121.

f. *Rights of Inheritance from or through Bastards*.—It was a rule of the common law that bastards could not transmit an estate by inheritance except to their own offspring: *Bent v. St. Vrain*, 30 Mo. 268; *Cooley v. Dewey*, 4 Pick. 93; *Barwick v. Miller*, 4 Desau. 434; *Jones v. Burden*, Id. 439; *Stover v. Boswell*, 3 Dana, 233; *Riley v. Byrd*, 3 Head, 20. This rule has been relaxed in most of the states. A mother may inherit from her bastard child: *Neil's Appeal*, 92 Pa. St. 193; *Garland v. Harrison*, 8 Leigh, 368; *Nolasco v. Lurty*, 13 La. Ann. 100; even to the exclusion of the natural brothers and sisters: *Nolasco v. Lurty*, *supra*; but it was held in Maryland that a mother could not inherit her illegitimate child's estate: *Miller v. Stewart*, 8 Gill, 128; and the same was held under an Indiana statute: *Doe v. Bates*, 6 Blackf. 533; and in Missouri it was held, that under a statutory provision that bastards could inherit and transmit an inheritance on the part of their mother as if they had been lawful would not give the mother nor the illegitimate brothers the right to inherit from a bastard: *Bent v. St. Vrain*, 30 Mo. 268. A father can not inherit from a bastard child in California: *Harrison's Estate*, Myrick's Prob. 121. And a statute providing that an illegitimate child should be in all respects upon an equal footing with the other children of the father is to be strictly construed, and does not enable the father or his legitimate children to inherit from him: *McCormick v. Cantrell*, 7 Yerg. 615. The husband or wife of a deceased bastard is, under the statutes of the states generally, allowed to claim inheritance from the deceased wife or husband: *Scoggins v. Barnes*, 8 Baxt. 560; *Doe v. Bates*, 6 Blackf. 533; *Brooks v.*

Francis, 3 McArthur, 109; *Hawkins v. Jones*, 19 Ohio St. 22; *Southgate v. Annan*, 31 Md. 113; *Succession of Briscoe*, 2 La. Ann. 268; *Coor v. Starling*, 1 Jones Eq. 243; but under a later North Carolina statute it was held that upon the death of an illegitimate son, intestate, unmarried, and without issue, a legitimate half-sister, born of the body of the same mother, inherits his real estate to the exclusion of the widow of such son: *Powers v. Kite*, 83 N. C. 156. In Connecticut a bastard has inheritable blood for the purpose of collateral as well as lineal descent through him: *Dickinson's Appeal*, 42 Conn. 491. But the rule prevails generally that no one can claim through a bastard: *McCormick v. Cantrell*, 7 Yerg. 615; *Berry v. Owens*, 5 Bush, 452; *Steckel's Appeal*, 64 Pa. St. 493; *Curtis v. Hewins*, 11 Met. 294. Where a bastard marries, and dies leaving a legitimate child, and the parent of the bastard afterward marry, and the father of the bastard had in her life-time recognized her, and also had recognized her after his marriage subsequently to her death, the child of the bastard may inherit through her from her father: *Ash v. Way*, 2 Gratt. 203. If a bastard dies without issue, and leaving no mother surviving him, the legitimate children of his mother inherit his estate: *Remington v. Lewis*, 8 B. Mon. 606; *Ellis v. Hatfield*, 20 Ind. 101. Under a statute legitimating the issue of all marriages null in law, a child of such a marriage inherits and transmits by descent as if born of a lawful marriage: *Dyer v. Brannock*, 66 Mo. 391; and see *Graham v. Bennett*, 2 Cal. 503.

g. *Miscellaneous Questions concerning Right of Bastards to Inherit.*—Bastards do not take under the term "children" in a statute regulating descent: *Blacklaws v. Milne*, 82 Ill. 505; *Porter v. Porter*, 8 Miss. 107; as the construction of such a word in such a statute is to be confined to lawful offspring; nor would they be included in the term "kindred:" *Hughes v. Decker*, 38 Me. 153; *McCool v. Smith*, 1 Black, 459. A provision made by a father for his illegitimate child will be supported in equity: *Harten v. Gibson*, 4 Desau. 139. And under a devise by a married man having no legitimate children "to the children I may have by A., and living at my decease," natural children who have acquired a reputation of being his children by her before the date of the will, are entitled: *Wilkinson v. Adam*, 1 Ves. & B. 422; but it is a rule that a bastard can not take as the issue of a particular person until he has acquired a reputation of being the child of that person, and this can not be before the birth: *Earle v. Wilson*, 17 Ves. 531. In California the issue of a marriage deemed "null in law" are, in relation to their father, the inheritors of his name, his heirs apparent, and entitled to look for and demand from him his care, maintenance, and protection; and, on the other hand, he has the unquestionable right of their custody, control, and obedience to the same extent as if they were the issue of a valid marriage: *Graham v. Bennett*, 2 Cal. 503. Under 1 Ind. R. S., 1876, p. 410, providing that the "real and personal estate of any man dying intestate, without heirs residing in any of the United States at the time of his death, or legal children capable of inhering, without the United States, shall descend to his illegitimate child or children, * * * and they shall be taken to be the heirs of said intestate in the same manner" as if legitimate, it was held that the brothers and sisters take as heirs, to the exclusion of an illegitimate: *Borroughs v. Adams*, 78 Ind. 160. The right of a child to the property of his father does not commence till after the death of the latter, and consequently, the rights of a bastard will be governed by the law as it then existed, and not by the law governing at the time of the marriage: *Carroll v. Carroll*, 20 Tex. 731.

MISCELLANEOUS QUESTIONS INVOLVING RIGHTS OF BASTARDS.—An illegitimate child is not entitled to administer upon the estate of his father as

against a brother of his father: *In re Pico*, 52 Cal. 84; and a bastard is not a child within the meaning of 9 & 10 Vic., c. 93, sec. 2, compensating the families of persons killed by accidents, and can therefore maintain no action under that statute: *Dickinson v. N. E. Ry Co.*, 2 H. & C. 735. A bastard born in Delaware, although begotten in another state, acquires a legal settlement in the place of its birth: *Smith v. State*, 1 Houst. C. C. 107. Illegitimate children of color may now prove their acknowledgment in Louisiana in the same manner as white children; and a child whose parents at the time of conception could not contract the marriage, because one of them was colored, can be legally acknowledged after the abolition of slavery: *Hebert's Succession*, 33 La. Ann. 1099.

ESLAVA v. LEPRETRE.

[21 ALABAMA, 504.]

APPOINTMENT BY COUNTY COURT OF GUARDIAN FOR LUNATIC WIFE, upon the petition of the husband, without notice to her, and without the issue of a writ *de lunatico inquirendo* and the verdict of a jury thereon, is *coram non judice* and void.

PROCEEDINGS OF COURT MAY BE IMPEACHED COLLATERALLY when they are void for want of the jurisdiction of the court.

NOTICE IS NECESSARY BEFORE APPOINTMENT OF GUARDIANS FOR INSANE PERSON, and if the proceedings are *ex parte*, they are null and void.

IF WIFE'S INSANITY IS SUGGESTED IN ACTION AGAINST HUSBAND AND WIFE to foreclose a mortgage, by the pleadings of both parties, the chancellor should allow no further proceedings in the case as to her, which could possibly affect her rights or interest, until he had inquired into the fact of her lunacy; and if on such investigation she should be found *non compos mentis*, he should appoint a committee or guardian *ad litem* to watch over her interest and defend her rights.

WIFE IS PROPER PARTY TO BILL TO FORECLOSE MORTGAGE given by the husband and wife, and to subject her dower interest to the payment of the debt, and the chancellor can not proceed to a decree against her till she is properly brought in.

WIFE IS NOT PROPERLY BROUGHT INTO COURT in an action against a husband and wife to foreclose a mortgage and subject her dower interest to the payment of the debt, where there is no prayer for process against her, but the process is prayed for, issued, and executed on her guardians, who were appointed for her by the court on the ground of her insanity, but on the petition of the husband merely, without notice to her and without the issue of a writ *de inquirendo* and the verdict of a jury thereon; guardians so appointed are not the legal representatives of the rights and interest of the wife.

DECREE PRO CONFESSO SHOULD NOT BE RENDERED AGAINST NON-RESIDENT MORTGAGEE on notice by publication in a suit to foreclose a mortgage brought by a prior mortgagee, and where he has not submitted himself to the jurisdiction of the court, without requiring the bond provided for by our statute in cases of non-resident defendant.

ALL ASSIGNMENTS OF ERROR SHOULD POINT TO PARTICULAR PART OF PROCEEDINGS of the court below in which the error complained of is thought to exist.

IT IS NOT ERROR TO DECREE SALE OF WHOLE MORTGAGED PREMISES without ascertaining whether the amount due might not have been raised by a sale of a part of the mortgaged premises, if the defendants do not suggest that the value of the mortgaged estate exceeds greatly the amount secured by the mortgage, and that the premises are capable of subdivision, and move for a reference to the master to ascertain the facts and report upon the subject; and this, notwithstanding there are two mortgages, if they are between the same parties, and for the same debt, and differ only as to the premises conveyed.

ON DECREE OF FORECLOSURE IT IS DISCRETIONARY WITH CHANCELLOR TO ALLOW TIME for the payment of sum reported by the master to be due; and he may decree a foreclosure and sale absolutely without giving day to the mortgagor, and such decree will be free from error.

ORDER OF REFERENCE IS IRREGULAR IF ONE OF PARTIES WAS NOT BEFORE COURT. It is irregular in a chancery proceeding to take any order generally affecting the merits of the case until it is at issue as to all parties; this is not excused by the supposition that the party not before the court was not a necessary one. It is enough that he was represented by the bill as having some interest in the subject-matter of the suit, and is regularly made a party by proper allegations and prayer for subpoena to bring him in.

WIFE HAS NO RIGHT OF DOWER IN LAND PURCHASED BY HUSBAND AND MORTGAGED BACK contemporaneously by the husband and wife to the grantor to secure the payment of the purchase money.

GUARDIANS OF LUNATIC WIFE HAVE NO AUTHORITY TO RELINQUISH HER DOWER in the real estate of her husband.

AGREEMENT ENTERED INTO AT TIME OF MORTGAGE FOR CONVERTING INTEREST INTO PRINCIPAL from time to time, as it shall become due, is oppressive and unjust and tending to usury, and consequently it can not be supported.

AGREEMENT THAT INTEREST ON MORTGAGE DEBT SHALL BE CONSIDERED PRINCIPAL, and shall carry interest, is valid where the interest has accrued, but there must be no extortion on the part of the mortgagee, otherwise equity will interpose for the relief of the mortgagor; and in such a case, where there is no other charge or incumbrance on the estate of which the mortgagee had notice at the time of the agreement, it will be allowed to be tacked to the mortgage, and there will be no objection to its forming a part of the consideration of a second mortgage given to secure the balance due on the first.

WHERE INTEREST ON MORTGAGE DEBT RUNS IN ARREAR, and in the mortgagee's account of arrears, rests are made from time to time, on which interest is calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, is signed by the mortgagor, and confirmed by a mortgage deed, although executed after a lapse of several years, for securing the balance, the transactions are not usurious, and the mortgagor is liable.

AGREEMENT BY WHICH MORTGAGOR AGREES TO PAY ADDITIONAL INTEREST, over and above the interest allowed by law, in consideration of his inability to pay the debt, and as an indemnity to the mortgagee for the difference between the amount of interest allowed in this state for the debt and the amount the mortgagee was paying on money borrowed by him in Louisiana, is unjust and oppressive, and will be set aside in equity.

MISTAKE IN STATING AMOUNT DUE ON MORTGAGE DEBT WILL NOT BE CORRECTED, and the sum omitted through mistake will not be considered as a part of the mortgage debt, to charge its payment upon the lands conveyed, where the rights of a subsequent mortgagee and of a purchaser of the equity of redemption have intervened before the mistake was discovered.

ON REFERENCE TO MASTER TO FIND AMOUNT DUE UNDER MORTGAGE, the mortgagor should be allowed a credit for all sums paid by him in good faith for filling up and walling a lot of the mortgagee's, less whatever sums were received by him, and are unaccounted for, of rents and profits arising out of the lot, where the proof is ample that the mortgagor had authority to make the expenditure.

BILL in equity by J. B. Lepretre against Miguel D. Eslava, and A. S. Dumie and O. Mazange, guardians of Louise Eslava, the wife of Miguel, alleging that Eslava, on September 10, 1835, purchased a lot in Mobile of the complainant for sixty-seven thousand seven hundred and seventy-six dollars and fifteen cents, and that by a deed bearing even date with the conveyance, Eslava and his wife mortgaged back the premises to Lepretre to secure the payment of the purchase money; that all the notes given by Eslava for the property had been paid except one for eighteen thousand four hundred and fourteen dollars, due September 7, 1839; that Louise Eslava had become of unsound mind since the execution of the mortgage, and that Dumie and Mazange had been duly appointed her guardians by the orphans' court. The bill alleges also that on January 30, 1845, Eslava was indebted to the complainant to the amount of twenty-three thousand four hundred and two dollars and twenty-nine cents, and to secure the payment of the sum Eslava and Dumie and Mazange, as guardians of Louise Eslava, executed to the complainant another mortgage, conveying one quarter interest in the lot first purchased and another lot in Mobile; that this mortgage was intended to secure the sum remaining due on the first, which amounted to twenty-three thousand four hundred and two dollars and twenty-nine cents. The bill prayed that Eslava and the guardians of Louise Eslava be made parties defendant; that subpœna issue to them, and that the equity of redemption be foreclosed, and that the lots

be sold to pay the debt. Subpœnas were issued and served on Eslava, Dumie, and Mazange; the subpœnas were directed to the last two as the guardians of Louise. Eslava in his answers denies that his wife was indebted to the complainant; admits that he owed complainant a large sum in the year mentioned, and the making of the mortgage and the payment of all the notes except the one for eighteen thousand four hundred and fourteen dollars, which with the interest on it has not been fully paid. The defendant Eslava further alleged that he was unable to meet the payment of the sums due complainant, and had to apply for more time from the complainant, and that the latter granted him further time, but in consideration thereof required usurious interest; that the complainant had compounded interest at eight per cent., had charged two per cent. above the legal rate of interest, and had compounded interest at ten per cent. also. Eslava admits making the second mortgage, and that the consideration recited is twenty-three thousand four hundred and two dollars and twenty-nine cents, but says the amount was not really so large, but was made up by compounding the interest and by the usury charged by the complainant. He further alleges that, as agent for the complainant, he had expended a large sum for filling up and walling a lot owned by the complainant out of his own funds, and insisted that this sum should be allowed him as a credit; that in 1845 he had mortgaged the premises to one Don Gregorio Funes y Munos for a large sum, and that since the making of the last mortgage he had sold his interest in the premises to Mazange; he also insists that Dumie and Mazange are not proper persons to represent his wife, as the former is the agent of the complainant and the latter is the owner of the equity of redemption. A decree *pro confesso* was entered against Dumie and Mazange, as they failed to answer. The complainant filed an amended bill, the material allegations of which are, that after making the second mortgage Eslava and the complainant entered into an agreement by which Eslava was to turn over to the complainant the leases of the premises, and the rent was to be applied on the mortgage debt for four years, in consideration of which the complainant was not to resort to his remedy on the mortgage; that annual rests were to be made between the parties in the accounting, and that the interest due was to be converted into principal annually; that Eslava acted as the agent of the complainant, and had refused to account; that the complainant had been compelled to borrow money in Louisiana on account of the failure of Eslava to pay, at the ad-

vanced rate of nine per cent. per annum; and that Eslava had voluntarily agreed to pay complainant two per cent. additional on the sums he had borrowed or would be compelled to borrow. The bill also prays that Mazange, Munos, Bartly, Coleman, Chantron, and Deas be made parties, as complainant is informed that they claim some interest. An order of publication was made on Munos, and a decree *pro confesso* was taken against him, and also against Mazange in his own right and as guardian of Louise Eslava. The subpoena issued against Deas was returned "not found." The court, by the consent of parties, subsequently made an order substituting one Stanley as guardian of Louise Eslava, in place of Dumie and Mazange. Eslava, in answering the amended bill, admits the contract as to the turning over of the rents, but alleges that he did account to the complainant for them and pay them over; and he insists that the agreement by which the complainant was allowed to demand ten per cent. was a device to avoid the usury laws of Alabama; and that even before this the complainant had charged a usurious interest in his annual accounts, and thus had raised the sum to twenty-three thousand four hundred and two dollars and twenty-nine cents at the time of the last mortgage; that these agreements were entered into by him to avoid a foreclosure; and Eslava further denies any knowledge of the agreement to pay the complainant the additional two per cent. on account of the higher interest he was compelled to pay for money borrowed in Louisiana. Mazange, Stanley, Bartly, Coleman, and Chantron answered, but it is unnecessary to notice their answers. A *pro confesso* decree was taken against Munos. The chancellor, on April 2, 1850, made an interlocutory decree referring the account to a master, to find out how much was due on the mortgages, etc., crediting Eslava with the sum paid for filling up and walling the lot of the complainant. The master filed a report, but both parties excepting to it, the chancellor set it aside as being inaccurate; and January 30, 1851, ordered another reference, directing that the sum of twenty-three thousand five hundred and two dollars and twenty-nine cents, due February 7, 1845, be taken as the basis of the account; that eight per cent. per annum be allowed on that sum till the first payment; that that payment be deducted, first paying interest, then principal, etc., and that he report the amount due on the mortgage. The master refused to allow Eslava a credit for filling up the lot, and reported the amount due to be nineteen thousand seven hundred and fifty-two dollars and eighty-seven cents. This report was

confirmed April 19, 1851, and no exceptions are reported by the master as having been taken. On the day of confirmation the defendants moved the court to file exceptions, but the motion was denied. The court, on April 19, 1851, decreed that defendants pay to the complainants the amount found due by the master on the thirtieth of April inst.; directed that the premises be sold at public auction, reserving the dower right of Louise Es-lava in the lands described in the second mortgage. A large number of exceptions were taken to the decree, of which it is necessary to notice only the following: 6. That the first order of reference was irregular and erroneous; 7. That the order of reference at the December term, 1850, was erroneous; 8. That in making the order of sale on April 19, 1851, the court erred; 9. That the court erred in decreeing a sale of the whole premises, when a part was sufficient to pay the debt and they were capable of being sold in parcels; 10. That in making references at different times, and in making the second before the first was disposed of, was erroneous; 11. That in proceedings under the second reference without disposing of the exceptions to the first, and in treating the first as void without setting it aside regularly, the court erred; 16. That in directing a sale so soon after the decree the court erred; 28. That the bill and the amended bill were not sufficient to warrant the proceedings had on them; 29. That the proceedings were irregular, informal, and insufficient, and not in accordance with the rules of chancery practice.

George N. Stewart, for the plaintiffs in error.

P. Hamilton, contra.

By Court, LIGON, J. In settling the law arising upon the assignments of error in this case, we will first consider those which involve points of pleading and practice; and then those that affect the merits of the controversy between the parties.

The three first assignments relate to the proceedings against Mrs. Eslava, who is shown by the bill to have been *non compos mentis* when it was filed, and under the guardianship of Dumie and Mazange. The order appointing the guardians was made by the judge of the county court of Mobile, on the day of , upon the petition of Miguel D. Eslava, who represented that his wife was *non compos mentis*; that prudence and necessity required him to dispose of a portion of his real estate; and that to cause it to bring a fair price in the market, it would be necessary to disincumber it of the dower of his wife; and as

she was *non compos mentis*, and could not relinquish it, he prayed that guardians might be appointed with full power to do so. On this petition, a general order appointing Dumie and Mazange guardians was made by that court.

This appointment was made upon no other assurance of the fact of Mrs. Eslava's lunacy than the petition of her husband, without notice to her, and without the issue of a writ *de lunatico inquirendo*, and the verdict of a jury thereon. Without the issue of this writ and the finding of a jury, the county court judge had no power to declare her a lunatic, or to appoint a guardian for her. These proceedings are indispensable to give the county court jurisdiction to make the appointment; and as they were not had, and that court is one of limited jurisdiction, the proceedings on the appointment of guardians are *coram non judice* and void. Such being the case, they may be impeached in any court, in a collateral proceeding, in which a party seeks a benefit under them: *Wightman v. Karsner*, 20 Ala. 446; *Voorhees v. Jackson*, 10 Pet. 449; *Wilcox v. Jackson*, 13 Id. 511; *Thatcher v. Powell*, 6 Wheat. 119; *Hickey v. Stewart*, 3 How. 762; *Spencer v. Barber*, 5 Hill, 568; *Denning v. Corwin*, 11 Wend. 652; *Miller v. Ewing*, 8 Smed. & M. 421; *Barrett v. Crane*, 16 Vt. 251.

There is no order of the county court of Mobile declaring Mrs. Eslava a lunatic or person *non compos mentis*. The nearest approach to it is found in the recitals of the order appointing the guardians, and these are wholly insufficient for that purpose. Neither does the record show that she had any notice whatever of the proceedings. They were *ex parte*, and are consequently null and void: *McCurry v. Hooper*, 12 Ala. 823 [46 Am. Dec. 280]; *Wait v. Maxwell*, 5 Pick. 219 [16 Am. Dec. 391]; *Chase v. Hathaway*, 14 Mass. 222.

In the case of *McCurry v. Hooper*, *supra*, it was well observed by the judge delivering the opinion of the court: "I think it is a fundamental principle of justice, essential to the right of every man, that he should have notice of any judicial proceeding which is about to be had for the purpose of divesting him of his property or the control of it, that he may appear and show to them who sit in judgment on his rights that he has not lost them by the commission of a crime; and that they should not be taken away from him by reason of a supposed misfortune. That he has the right to appear before the jury and the court, to show that he is not insane, and that he and his property should not be put in charge of another, is a self-evident truth, and is denied

by no legal authority." If this were not so, oppression the most unholy might be visited upon the unsuspecting victims of the cupidity or malice of others, under the forms of law; and the writ of inquisition authorized by the statute would become indeed inquisitorial in the most offensive sense of that word.

The statute conferring power on that court over this subject is in these words: "It shall be lawful for every orphans' court within the state, where any idiots or lunatics shall be within the jurisdiction thereof, to appoint them, or either of them, a guardian, taking bonds with approved security, for the faithful administration of the trust reposed in such guardian, in the same manner as bonds are taken from the guardians of orphans; and such guardian, when so appointed, shall continue during the pleasure of the court, and shall have the same power to all intents and purposes, and shall be subject to the same rules, orders, and restrictions as guardians of orphans are: such lunacy being ascertained by the inquisition of a jury, by virtue of the writ to be issued by the court to the sheriff of the county for that purpose."

"Inquisitions as to idiots, lunatics, and persons *non compos mentis* may be ordered in vacation, or in open court, and made returnable as process of citation. On sufficient cause shown, the judge may order such inquisition to be had before him; in other respects, the same proceedings shall be had thereon as heretofore:" Clay's Dig. 302, secs. 29, 30. The last section refers to proceedings under the act of 1806, which required a jury of twelve men from the vicinage of the supposed lunatic to be impaneled by the sheriff, a majority of whom might render a verdict without the presence or sanction of the county court; and which did not authorize such judge to order the inquisition to be had before himself. It does not dispense with the jury, but authorizes the judge, for good cause shown, to have the writ returnable before himself, and the jury to make the inquisition under his supervision and direction.

As the fact of the insanity of Mrs. Eslava had not been ascertained by the orphans' court of Mobile, and as it was suggested alike in the bill of complainant and the answer of Miguel D. Eslava, the chancellor should have allowed no further proceedings in the case as to her, which could by possibility affect her rights or interest, until he had inquired into the fact of her lunacy. This he had ample power to do without directing an issue at law for that purpose: *Alexander v. Alexander*, 5 Ala. 517. If, on such investigation, she should be found *non compos*

mentis, he should have appointed a committee or a guardian *ad litem* to watch over her interest and defend her rights.

Again, her right of dower, if any she had, in the premises conveyed by the first mortgage to Lepretre, formed an incumbrance on the fee which that deed purported to convey, and would tend to becloud the title, and consequently might well cause the lands to sell for less than their true value. To prevent this result, Eslava, as mortgagor, and the holders of the mortgage made after those to the complainant, as well as Mazange, the purchaser of the equity of redemption under all the mortgages, are deeply interested; and notwithstanding Mrs. Eslava is allowed a day by the statute to come in and review the decree, after her coverture and disability arising from lunacy have ceased, yet the decree of the court against her right to dower would give confidence to purchasers, and go far to cause the mortgaged premises to sell for their full value. To enable the court to pass on her right, she might properly be made a party, especially on the suggestion of Eslava in his answer; or by the complainant himself, who is interested in making the mortgaged lands bring the amount of his debt. It is evident, from the record in this case, that the chancellor regarded and treated her as a party to the case in the court below, even in his final decree, and this renders it important to consider whether she was really such under the rules of practice which govern that court; and if she has not been rightly brought in, has the irregularity been waived by her, or by the defendants who have an interest in her becoming a party? That the latter is not the case admits of no doubt.

It results from what has been said that Dumie and Mazange, though parties to the original and amended bills of the complainant, were not the legal representatives of the rights and interest of Mrs. Eslava; and as neither bill is so framed as to make her individually a party, the chancellor erred in proceeding to a final decree until she was properly brought in. That she was a proper party is abundantly shown by both the original and amended bills, as by each it is sought to subject her dower interest in the lands mentioned in the two deeds of mortgage to the payment of the debts secured by them. To the first deed she appears as joint mortgagor with her husband, which is so acknowledged as to pass her dower estate in the land; and to the second, Dumie and Mazange assume to act as guardians, and to pass her interest in the premises by joining with Miguel D. Eslava in its execution.

In neither bill is there any prayer for process against her; but process is prayed for, issued, and executed on Dumie and Mazange as her guardians, and on the original bill a decree *pro confesso* was taken against them in that character.

It is contended, however, that she is not entitled to dower in the lands mentioned in the first mortgage, and consequently was not a necessary party to a bill filed to foreclose it. To this it may be replied, that she was joint mortgagor with her husband, and is charged to be a joint debtor with him, and the complainant, having received a mortgage from her to secure this debt, is not in a situation to excuse his neglect in failing to proceed regularly against her, by setting up her want of interest in the subject of the mortgage; being a party to that deed, she has an unquestionable right to litigate with him the question of her title to the lands conveyed by it. But it is sufficient to say, that complainant considered and treated her as his debtor, and as a party to both mortgages in his original bill, and should have brought her rightly into court, before he could be allowed to proceed further against her.

Nor is this error cured by the subsequent appointment of a guardian *ad litem* to defend for her. As she was not in court, either on the original or amended bill, by service of process, under any rule known to our chancery practice, the appointment of such guardian was irregular, and the answer filed by him could not bring her before the court. If she were in truth *non compos mentis*, as both bills allege, she could not waive the irregularity herself, and the chancellor, who is esteemed the jealous guardian of the rights of such suitors in his court as are deemed incapable in law to protect their own interests, should not have allowed another to do so for her.

The decree of *pro confesso* against Don Gregorio Funes y Munos was regularly taken on notice to him by publication; but as he had not filed an answer, nor in any other manner submitted to the jurisdiction of the court, and as he had received a mortgage on the same lands from Eslava, it was error to render a final decree against him without requiring the complainant to make the bond provided for by our statute in cases of non-resident defendants who have not submitted to the jurisdiction of the court: *Rowland v. Day*, 17 Ala. 681; *Erwin v. Ferguson*, 5 Id. 158; Clay's Dig. 353, sec. 45.

The fifth, sixth, fourteenth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-fifth assignments of error are not well taken, as the proceedings to which they re-

late are regular in the court below. The twenty-eighth and twenty-ninth assignments are too general in their character; all assignments of error should point to a particular part of the proceedings of the court below in which the error complained of is thought to exist.

The eighth, ninth, and sixteenth assignments may be considered together. We have already seen that so far as the final decree affects the rights and interest of Mrs. Eslava in the mortgaged premises, it is irregular, and that it can not be sustained against Don Gregorio Funes y Munos, as it is absolute in its terms, and he is a non-resident defendant who has not submitted to the jurisdiction of the court. But so far as the parties are concerned who were actually before the court at the time of the rendition of the decree, in form it is free from error. It was held by this court in the case of *Ticknor v. Leavens*, 2 Ala. 149, that in a case where the defendants are adults, it is not error to decree a sale of the mortgaged premises without ascertaining, by a report of the master, whether the amount due might not have been raised by a sale of a part of the mortgaged premises, unless it be suggested that such reference is proper. If the adult defendants stand by, without suggesting that the value of the mortgaged estate exceeds greatly the amount of the debt secured by the mortgage, and that the premises are capable of subdivision, and moving for a reference to the master to ascertain the facts and report upon the subject, the chancellor may well go on and decree a sale of the whole; and this notwithstanding there are two mortgages, as they are between the same parties, for the same debt, and differ only as to the premises conveyed.

A different rule would prevail if any of the defendants were infants, persons *non compos mentis*, or, indeed, laboring under any legal disability to appear themselves and contest the matter with the complainant. In all such cases the chancellor will extend to them every protection of which an adult could avail himself by the rules which regulate proceedings in courts of equity: *Mills v. Dennis*, 3 Johns. Ch. 367. If he failed to do so, it would be error.

It may be, also, that, where there are two mortgages, in favor of different mortgagees, on a part of the mortgaged premises, and one only of the mortgages extends to the other portion, he would compel the latter mortgagee to exhaust the estate which was exclusively devoted to the payment of his debt before he would foreclose, in favor of such mortgagee, as to the premises

contained in both mortgages. So also if the mortgagor had sold and conveyed his equity of redemption in one parcel, and retained it in the other, the chancellor would first foreclose and sell that portion in which the mortgagor retained the equity before he would sell the other. For it is well settled that, where one creditor has two securities for his debt, and another but one, and that is common to them both, the former will be compelled first to exhaust the security which is exclusively his own before he will be allowed to proceed against the one which is common to each. This question, however, does not arise in this case, as the mortgage to Don Gregorio Funes y Munos covers the entire premises described in both the mortgages to the complainant; and Mazange is the purchaser of the equity of redemption in the whole estate mortgaged. Had the parties been regularly before the court when the final decree was made, no just exception could be taken to that portion of it which directs a sale of the lands if the mortgage debt was not paid by the thirtieth of April. It is discretionary with the chancellor to allow time for the payment of the sum reported by the master to be due. He may, if he will, decree a foreclosure and sale absolutely, without giving day to the mortgagor, and such decree will be free from error: *Mussina v. Bartlett*, 8 Port. 277.

The sixth, seventh, tenth, and eleventh assignments of error may be considered together, as they each have relation to the orders of reference made at different times by the chancellor. The objection to the decree and order of reference made at the December term, 1850, is well taken, because Deas, who was made a party to the amended bill, was not before the court by service of subpœna, or by service perfected in any other manner whatever at the time that decree and order were made. He is represented in the bill as a resident of the state, and the subpœna issued against him is returned "not found." It is irregular, in a chancery proceeding, to take any order generally affecting the merits of the case until it is at issue as to all the parties. This is not excused by the supposition that the party not before the court is not a necessary one; it is enough that he is represented by the bill as having some interest in the subject-matter of the suit, and is regularly made a party by proper allegations, and prayer for subpœna to bring him in. The same irregularity extends to the order of reference made subsequently at the hearing.

It is unnecessary to examine the other errors assigned in relation to the points of practice and pleading, as in almost every

instance in which they can avail the plaintiffs in error, they derive their availability from their connection with the irregularities already examined.

As the case must be sent back to the chancery court for further proceedings, it may not be amiss to examine the ruling of the chancellor on the merits.

We fully agree with him that Mrs. Eslava is not entitled to dower in the lands mentioned in the first mortgage to Lepretre. It appears that these lots were sold by him to M. D. Eslava, and a deed made to the latter on the same day on which the mortgage was executed; the two deeds were therefore contemporaneous acts. "To entitle the wife to dower of lands owned by her husband during coverture, he must not only be seised, but the land must vest in him beneficially for his own use. He must not be the mere conduit for passing the title to another. Nor is the seisin sufficient when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor or to a third person, to secure the purchase money in whole or in part. Dower can not be claimed against rights under the mortgage. The husband is not deemed sufficiently or beneficially seised by such an instantaneous passage of the fee in and out of him as to entitle his wife to dower against the mortgagee. A widow in this case, on foreclosure of the mortgage and sale of the mortgaged premises, will be entitled to her claim to the extent of her dower in the surplus proceeds after satisfying the mortgage; and if the heir or the owner of the equity of redemption redeems, or she brings her writ of dower, she is let in for her dower on contributing her proportion of the mortgage debt." 4 Kent's Com. 38; *Holbrook v. Finney*, 4 Mass. 566 [3 Am. Dec. 243]; *Clark v. Munroe*, 14 Id. 351; *Bogie v. Rutledge*, 1 Bay, 312; *Stow v. Tiff't*, 15 Johns. 458 [8 Am. Dec. 266]; *McCauley v. Grimes*, 2 Gill & J. 318 [20 Am. Dec. 434]; *Gilliam v. Moore*, 4 Leigh, 30 [24 Am. Dec. 704].

As to the land, however, conveyed by the second mortgage to Lepretre, it is clear that her right to dower, if she survive her husband, is good, and can be in no wise impaired by the act of Dunnie and Mazange, who became parties to that deed in the pretended capacity of her guardians, and as such undertook to pass her claim of dower to the mortgagee. We have seen that their appointment is absolutely void; and were it otherwise, I apprehend, the guardians of a lunatic wife can have no authority to relinquish her dower in the real estate of her husband. The statute which authorizes the appointment of such

guardians provides that they "shall have the same powers, to all intents and purposes, and shall be subject to the same rules, orders, and restrictions, as guardians of orphans:" Clay's Dig. 302, sec. 29. An ordinary guardian has no authority of his own mere will to sell the real estate of his ward; he could not thus pass the title, and such a sale would be a nullity. "With regard to the real estate, it may be observed, that the guardian has no further concern with or control over it than what relates to the leasing of it, receiving the rents and profits, and keeping it in order. He may lease it, but the lease must not extend beyond the time when the ward will be of full age:" 1 Bouvier's Inst. 143, 144; *Ross v. Gill*, 4 Call, 250; *Truss v. Old*, 6 Rand. 556 [18 Am. Dec. 748]; *Jones v. Ward*, 10 Yerg. 160; *Genet v. Tallmadge*, 1 Johns. Ch. 561; *Snook v. Sutton*, 5 Halst. 133. Again, the requirements of the statute in relation to the mode by which the wife is to relinquish her dower in the real estate of her husband, conveyed by him during coverture, effectually forbid the idea that such relinquishment can be made by any person except herself. It is required that she should be examined privately and apart from her husband, and that, on such examination, she shall acknowledge that she makes the relinquishment "as her voluntary act and deed, freely, without any fear, threats, or compulsion of her husband." Neither a guardian nor an agent can comply with the requisitions of this act; and consequently it may be safely held, that none but the wife, in person, can relinquish her claim to dower in the lands of her husband, aliened during coverture.

The next question presented arises out of the settlement between Lepretre and Eslava, in 1845, out of which sprung the second mortgage and the note, the payment of which is secured by it. It is for the sum of twenty-three thousand four hundred and two dollars and twenty-nine cents, and it is insisted by Eslava that in making up this sum compound interest was charged and allowed. The governing principle acted upon in matters of mortgage by the courts of equity is, that the mortgagee shall be entitled only to principal, interest, and costs; and it protects the debtor with peculiar jealousy against any attempt on the part of the mortgagee by taking advantage of the necessities of the mortgagor to impose on him harsher terms. Acting on this principle, equity has held, that an agreement entered into at the time of the loan, for converting interest into principal from time to time as it shall become due, is oppressive and unjust, and tending to usury, and consequently it can not

be supported. But when interest has once accrued due, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and thenceforth carry interest. Indeed, it would be injurious to the mortgagor to establish the contrary, as it would remove an inducement to the mortgagee's permitting his principal to remain, and consequently, equity has recognized such agreement; but there must be no extortion on the part of the mortgagee, or otherwise equity will interpose for the relief of the mortgagor: *Brown v. Barkham*, 1 P. Wins. 654; *Thornhill v. Evans*, 2 Atk. 330; Coote on Mort. 431.

Equity considers the arrears of interest so converted into principal by agreement between the parties in the light of a further advance, and when, as in this instance, there was no other charge or incumbrance on the estate of which the mortgagee had notice at the time of such agreement and settlement, it will be allowed to be tacked to the first mortgage, and there can be no objection to its forming a part of the consideration for the second: 3 Powell on Mort., Rand's ed., 911; *Pauling v. Pauling*, 4 Yeates, 220; *Barclay v. Kennedy*, 3 Wash. 350; *Digby v. Craggs*, 2 Amb. 612; *Greenleaf v. Kellogg*, 2 Mass. 568; Coote on Mort. 431.

It is also well settled that in case interest runs in arrear, and in the mortgagee's account of arrears rests are made from time to time, on which interest is calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, is signed by the mortgagor, and confirmed by a deed, although executed after a lapse of several years, for securing the balance, the transactions are not usurious, and the mortgagor is liable: *Blackburn v. Warwick*, 2 You. & Coll. 92. In the present case the settlement on the basis of rests in the account, and interest compounded on such rests, formed the basis on which the note for twenty-three thousand four hundred and two dollars and twenty-nine cents, and the mortgage of 1845, were executed by Eslava, and as he has thus sanctioned it, and there was no conflicting lien or subsequent incumbrance on the property at the time of this settlement, he will not be allowed to complain of it, and the court will charge the mortgaged premises with the payment of the sum so found due.

The agreement, however, of the fourth of February, 1845, by which Eslava agrees that Lepretre shall be allowed to compound the interest on the mortgage debt, annually, for the term of four years, at the rate of eight per cent., does not deserve the favor

of a court of equity, and will not be enforced. It has been before remarked that a court of equity regards with jealousy all arrangements made between the mortgagor and mortgagee, by which the latter obtains an advantage over the former not stipulated for in the mortgage deed itself. And while it will permit the mortgagee to state his account for interest past due, allowing rests, and compounding the interest at each rest, if they are not too frequent, considering the interest accrued already as a further advance; yet, acting on the principle that the parties do not deal on terms of strict equality, equity has held that an agreement entered into at the time of the loan, for converting interest into principal from time to time as it shall become due, is oppressive and unjust, and tending to usury, and that consequently it can not be supported: *Mitford v. Featherstonhaugh*, 2 Ves. sen. 445; *Ossulston v. Yarmouth*, 2 Salk. 449; *Chambers v. Goldwin*, 9 Ves. 271; *Coote on Mort.* 433, 434. The agreement under consideration comes under the rule laid down in these and numerous other cases, and the complainant can not be allowed to set it up and enforce it against Eslava.

We regard the other agreement of the same date, by which Eslava, in consideration of his inability to pay the debt to Lepretre, and as an indemnity to the latter for the difference between the amount of interest allowed by the laws of this state on the debt of Eslava to him, and that which Lepretre was paying on money borrowed in Louisiana, binds himself to pay the additional interest of two per cent. per annum, over and above the eight per cent. allowed by law, as rightly set aside by the chancellor. It is both oppressive and unjust, and deserves no favor at the hands of a court of equity.

We agree, also, in the conclusion of the chancellor, that on a reference to the master the amount of the debt secured by the second mortgage should be taken as the basis of the account, and as the true sum due from Eslava to Lepretre at that date, which is properly chargeable on the mortgage premises. We perceive, however, that in setting down the amount of this note in his directions to the master, the chancellor has stated it to be twenty-three thousand five hundred and two dollars and twenty-nine cents, instead of twenty-three thousand four hundred and two dollars and twenty-nine cents, as it is shown to be in the record and mortgage. He was doubtless betrayed into this error by the fact that the former is abundantly proved to be the amount which was really due to Lepretre at the time the note was executed, but through mistake both the note and

mortgage are for one hundred dollars less. The sum thus omitted through mistake can not be considered as a part of the mortgage debt to charge its payment upon the lands conveyed, especially as the rights of a subsequent mortgagee and a purchaser of the equity of redemption have intervened before the mistake was discovered and corrected.

We think, also, that on the accounting Eslava should be allowed a credit for all sums paid by him in good faith for filling up, walling, etc., the lot of Lepretre, mentioned in the pleadings and proof, less whatever amounts may have been received by him and are unaccounted for, of rents and profits arising out of said lot. The proof is ample that he had Lepretre's authority to make the expenditure, and the latter should not now be allowed to repudiate it.

It remains only to be said, that, for the errors hereinbefore noted, the decree must be reversed, and the cause remanded.

It may not be amiss to add, that, on the cross-error assigned by Lepretre, no reversal could take place, as his only complaint is, that the amount of money which the decree ascertains to be due to him on the mortgage was too small, when it is evident, from our ruling on the errors assigned by the defendants, it is greater than it will be found to be when the error of one hundred dollars is corrected, and Eslava is allowed a credit for the money expended in filling up the lot mentioned in the pleadings and proof.

CHILTON, J., concurred in the reversal, but differed from that part of the opinion which asserts the necessity of making Mrs. Eslava a party under the facts disclosed in the record.

JUDGMENTS AGAINST NON-RESIDENTS: See *Lorejoy v. Albee*, 54 Am. Dec. 630; note to *Flint River Steamboat Co. v. Foster*, 48 Id. 273; *Dearing v. Bank of Charleston*, Id. 300, and note; *Ewer v. Coffin*, Id. 587.

USURY, WHAT IS, AND WHEN AVAILABLE AS DEFENSE: See the note to *Davis v. Garr*, 55 Am. Dec. 387, discussing this subject.

RIGHT TO DOWER, WHEN BARRED BY JOINING IN MORTGAGE: See *Taylor v. Fowler*, 51 Am. Dec. 469, and the cases cited in the note.

JUDGMENT OF COURT MAY BE IMPEACHED COLLATERALLY when it is void for want of jurisdiction: *Horner v. Doe ex dem. State Bank*, 48 Am. Dec. 355, and note.

WHERE NO NOTICE IS GIVEN TO NON COMPOS, proceedings of orphans' court in the nature of an inquisition are void: *McCurry v. Hooper*, 46 Am. Dec. 280.

INTEREST, WHEN COMPOUNDED: See *Daig v. Barkley*, 45 Am. Dec. 762, and note; also note to *Hart v. Dorman*, 50 Id. 291.

GENERAL ASSIGNMENT OF ERROR WILL BE DISREGARDED: *Carskadden v. Poorman*, 36 Am. Dec. 145.

EQUITABLE RELIEF AGAINST MISTAKE IN WRITTEN INSTRUMENT GENERALLY: See *Mosby v. Wall*, 55 Am. Dec. 71; *Leitensdorfer v. Delphy*, 1d. 138.

WHITE v. BANKS.

[21 ALABAMA, 705.]

SURETIES HAVE RIGHT TO CLAIM CONTRIBUTION FROM EACH OTHER in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions.

IF OFFER OF SECURITY IS MADE BY PRINCIPAL UPON CONDITION THAT SURETIES EXECUTE RELEASE, the refusal by one to accept the terms offered would not prevent the other from acceding to the proposition; and in such case, although the surety refusing would have a right to demand that the proceeds of the securities received should be fairly devoted to the reduction of the common debt, such proceeds could in no other way inure to his benefit; and the payment, so far as the right of contribution is concerned, would be considered as made by the paying surety out of his own funds, and if it amounted to his proportion of the debt, it would discharge him from contribution.

FRAUDULENT DEED OF ASSIGNMENT IS CAPABLE OF CONFIRMATION by the creditors; and after such a deed has been executed, and the creditors assenting to its provisions have been paid from the effects assigned, the transaction as to them will not be disturbed.

REFUSAL BY SURETY TO ACCEPT FRAUDULENT DEED OF ASSIGNMENT by the principal for the benefit of his creditors deprives him of his right of contribution against a co-surety who has accepted the deed, when the deed has been executed, as to the assenting creditors, and the co-surety has received under it an amount exceeding his contributive share, and has applied it on the debt.

CUMMINGS, PITCHER & Co. made a deed of assignment of their property for the benefit of their creditors; the deed required that the creditors should accept the assignment within a certain time and release the assignors or receive none of the proceeds; and also that the portion of the property that would have been distributed amongst the non-assenting creditors if they had accepted it should be reserved to the assignors. The plaintiff and defendant were co-sureties on a note executed by the assignor in favor of the State Bank of Alabama; the defendant signed the deed within the time prescribed, and released the assignor; the plaintiff refused to sign it. White, the defendant, collected three thousand dollars under the assignment,

after considerable trouble and some expense, and applied it on the note, and left a balance due of one thousand five hundred dollars. The bank brought an action against Banks for this balance, obtained judgment against him, which he discharged, and then made this motion in the circuit court for a summary judgment against White, as co-surety, to recover half of the amount paid by him. The circuit court rendered judgment in favor of the plaintiff for half the amount paid by him. The defendant brought error.

E. W. Peck, Ormond and Nicolson, and N. Harris, for the plaintiff in error.

P. and J. L. Martin, contra.

By Court, GOLDTHWAITE, J. Sureties have the right to claim contribution from each other in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions: Burge on Suretyship, 384; Story's Eq. Jur., sec. 493. It is upon this principle that sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against the principal debt: Theobald on Principal and Surety, c. 11, sec. 283; Story's Eq. Jur., sec. 499. This right, it is true, may be affected by circumstances which would render the application of this rule inequitable; as where one of the sureties, before joining in the bond, stipulated for and obtained security from the principal debtor for his sole benefit: *Moore v. Moore*, 4 Hawks, 358 [15 Am. Dec. 523]; and, upon the same principle, we think it clear that if one surety should obtain indemnity for a consideration paid by him, the other could not claim the benefit of such indemnity without paying his proportion of the consideration. So also if an offer of security is made by the principal upon the condition that the sureties should execute a release, the refusal by one to accept the terms offered would not prevent the other from acceding to the proposition; and in such case, although the surety refusing would have the right to demand that the proceeds of the securities received should be fairly devoted to the reduction of the common debt, such proceeds could in no other way inure to his benefit; and the payment, so far as the right of contribution is concerned, would be considered as made by the paying surety out of his own funds, and if it amounted to his proportion of

the debt, it would discharge him from contribution. The offer had been made to all; and there would be no equity in allowing the party who had refused to accede to the proposition, and had paid nothing, to share equally in the indemnity purchased under such circumstances by the other surety.

In the case under consideration the offer of partial indemnity was made by Cummings, Pitcher & Co., through the medium of the assignment, to both Banks and White. The former refused and the latter accepted the proposition; and, upon the principle which we have stated, it is clear that Banks would not be permitted to share equally in the indemnity which White had received, unless the fact of the deed of assignment being fraudulent upon its face, as it is conceded to be, would have the effect of changing the equities which would otherwise exist between the parties.

Our first impression was, that this circumstance would have that effect, and that the refusal of Banks to become a party to a deed of this character could not deprive him of any right of contribution, as against the other surety; but, upon more mature consideration, we are satisfied that such is not the law. The deed is only fraudulent as to creditors, but is capable of confirmation by them; and it is clearly deducible from the authorities of this state, as well as of other states, that after the deed has been executed and the creditors who assented to its provisions have been paid from the effects assigned, the transaction, as to them, will not be disturbed. The assignee, who must, as the deed is fraudulent on its face, be regarded as having notice, can not be held responsible, either in law or equity, after he has executed it: *Wakeman v. Grover*, 4 Paige, 23, 42; *Hazard v. Franklin*, 2 Ala. 349; and if a creditor can not, after the execution of such a deed, hold the assignee responsible, *a fortiori* the same rule of protection must apply to the parties whom the deed was intended to secure.

Under the influence of the cases cited, after White had received the proceeds of the assignment, no creditor could have pursued it with success; and the principle being settled, that the assignment is valid so far as it has been executed, it is too late for Banks to impeach it.

Neither are there any considerations of natural justice which should allow Banks to participate equally in this indemnity. Although he refused to assent to the provisions of the deed, he has remained passive and inactive, realizing to a certain extent the benefits of the assignment, by the application of its pro-

ceeds to the reduction of the debt upon which he was bound as surety; and after it has been executed, and after he has received all the benefits which can result from its execution, he claims the right to impeach it, as against his co-surety. To allow him to do so would be contrary to those principles upon which the rights of sureties, as between themselves, depend.

Our conclusion is, that the amount received by White upon the assignment of Cummings, Pitcher & Co. must, under the circumstances disclosed by the record, be considered as his separate indemnity; and as this has been applied to the payment of the principal debt, and exceeds one half of the amount due upon the same, it follows that Banks had no right of contribution as to him, and the ruling of the court below was therefore erroneous.

The judgment must be reversed, and the cause remanded.

RIGHT OF SURETY TO CONTRIBUTION FROM HIS CO-SURETY: See *Aiken v. Peay's Ex'rs*, 53 Am. Dec. 684; *Dole v. Warren*, 52 Id. 640; *Jones v. Blanton*, 51 Id. 415; *Wayland v. Tucker*, 50 Id. 76; *Preston v. Preston*, 47 Id. 717.

RIGHT OF SURETY TO INDEMNITY HELD BY CO-SURETY: See the note to *Hall v. Cushman*, 43 Am. Dec. 562, discussing this subject; see also *Brown v. Ray*, 45 Id. 361.

FRAUDULENT ASSIGNMENT FOR BENEFIT OF CREDITORS MAY BE AFFIRMED by the creditors: See the note to *Adlum v. Yard*, 18 Am. Dec. 621, discussing this subject.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

STATE v. SMITH.

[12 ARKANSAS, 622.]

OMISSION OR ADDITION OF MIDDLE LETTER is not a misnomer or variance, as the law knows but one Christian name.

THE defendant, John Smith, was indicted by the name of John B. Smith. For this reason he pleaded in abatement of the indictment, and the state's demurrer to his plea being overruled, the state took this appeal.

Clendenin, attorney general, for the state.

By Court, SCOTT, J. The law knows of but one Christian name. The entire omission of a middle letter is not a misnomer or variance: Lit. 3 a; *Rex v. Newman*, 1 Ld. Raym. 562; *Franklin v. Talmadge*, 5 Johns. 84; *Reid v. Lord*, 4 Id. 119. "The middle letter is immaterial, and a wrong letter may be stricken out or disregarded:" *Keene v. Meade*, 3 Pet. 9. The demurrer ought to have been sustained, and judgment rendered accordingly.

Let the judgment be reversed, and the cause be remanded.

CASES IN THIS SERIES, UPON THE ABOVE PROPOSITION, are cited or referred to in the notes to *Wilkerson v. The State*, 53 Am. Dec. 137; and *Edmundson v. The State*, 52 Id. 169. See also the cases to which these notes are appended.

KELLY v. NEELY.

[12 ARKANSAS, 657.]

COMMON AND CANON LAW COMPUTE DEGREES OF CONSANGUINITY by commencing at the common ancestor and reckoning downward, and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other.

AFFINITY IS RELATION FORMED BY MARRIAGE.

HUSBAND OF AUNT AND HUSBAND OF NIECE ARE RELATED within the fourth degree of affinity.

MANDAMUS. The opinion states the facts.

Watkins and Curran, for the plaintiff.

Fowler, for the defendant.

By Court, JOHNSON, C. J. This was an application to this court for an alternative writ of *mandamus* to be directed to the Hon. Beaufort H. Neely, judge of the Independence circuit court, commanding him to take cognizance of and proceed to hear and determine a certain cause therein pending, or to show cause why he would not do so. The writ was issued in accordance with the prayer of the petition, and returned with the judge's answer indorsed thereon, and in which he shows for cause why he had not, and why he still refuses to take cognizance thereof, that Joseph H. Egner, who is one of the defendants in said cause, is the husband of Euphemia Egner, and that said Euphemia is the maternal aunt of Margaret F. Neely, who is the wife of the respondent. From these facts he insists that he is related to Egner by affinity within the prohibited degrees, and that therefore he is legally disqualified to preside upon the trial.

The twelfth section of the sixth article of the constitution declares that "no judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been of counsel, or have presided in any inferior court, except by consent of all the parties." The sixteenth section of chapter 50 of the digest declares that "no judge of the circuit court, justice of the county court, or judge of the court of probate shall sit on the determination of any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or shall

have been of counsel, without consent of parties." The method of computing the degrees of consanguinity in the canon has been adopted by the common law, and is as follows: We begin at the common ancestor, and reckon downwards, and in whatsoever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother are related in the first degree, for from the father to each of them is counted only one. Titius and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of Titius: See Co. Lit. 23, and 2 Bla. Com. 207. This rule, applied to Mrs. Egner and Mrs. Neely, the latter being the niece of the former, will necessarily place them in the second degree of consanguinity to each other.

Affinity is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. It is used in contradistinction to consanguinity. It is no real kindred. A person can not by legal succession receive an inheritance from a relation by affinity, neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity: See Bouv. Law Dic. 89, and the cases there cited. The degrees of affinity being computed in the same way as those of consanguinity, it follows, as a necessary consequence, that in case there is any affinity whatever, as between Neely and Egner, it must be of the second degree, as that is the relation of their wives by consanguinity. The question then is, whether there is any affinity whatever as between the husbands of the aunt and niece. The counsel on both sides have referred us to several cases, which we will now proceed to notice.

The case of *Blodget v. Brinsmaid*, 9 Vt. 30, does not come fully up to the facts as disclosed in this. There the objection taken was founded upon an affinity arising out of a marriage between the party who was alleged to have performed a judicial function, and the sister of the real defendant in the execution, whose property he had appraised. The appraiser having intermarried with the sister of the party, there could be no doubt of the existence of an affinity so long as the marriage continued,

and consequently the only question for the court to determine in that case was whether such marriage was undissolved at the time of the performance of the judicial act. The rule, as applicable to the facts of that case, was there correctly laid down, and under it there could be no doubt of the affinity, in case the marriage still subsisted. It is there said that "consanguinity is the having the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the *consanguinei* of the other party to the marriage; but in such case these respective *consanguinei* do not become related by affinity to each other. In this respect these modes of relationship are dissimilar: 1 Bla. Com., c. 15, p. 434, Christian's notes to same; 15 Vin. Abr. 256. The relationship by consanguinity is in its nature incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is by affinity brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister."

In the case of *Higbe v. Leonard*, 1 Denio, 187, the objection to the acts of the justice was, that his two brothers had married two sisters of the plaintiff, and it was also alleged that such marriage had taken place before the commencement of the suit before the justice, and that the persons so connected were still living. The supreme court sustained the action of the justice, upon the ground that, although he was related by affinity to the two sisters of Higbe, the plaintiff, yet there was no such relation between him and Higbe. The court in that case laid down the same rule that was stated in the case already referred to of *Blodget v. Brinsmaid*, 9 Vt. 30, and as a matter of course, under that rule, there could exist no relationship whatever between the party and the justice.

In the case of *Edwards v. Russell*, 21 Wend. 63, the proof was that the justice and the plaintiff were cousins. There no doubt could exist as to the disqualification, as they were related by consanguinity, and that within the prohibited degrees.

In the case of *Cain v. Ingham*, 7 Cow. 478, the substance of the decision is, that the marriage having been dissolved by death, there was no principal cause of challenge, but that under the circumstances actual favor or influence might have been shown by evidence, and if so shown, might have rendered the juror incompetent.

The case of *Foot v. Morgan*, 1 Hill (N. Y.), 654, would seem to throw more light upon the question before us than any that has

yet been brought to our view. In that case a motion was made to set off a judgment in favor of the defendant obtained in the name of H. M. in a justice's court, against a judgment rendered in favor of the plaintiff in that (supreme) court. The motion was opposed, on the ground that the justice's judgment was void for want of jurisdiction, and an affidavit was produced showing that Morgan, the then defendant, was the real plaintiff before the justice, and was related to the justice; the said Morgan and the justice having married sisters, and both their wives being alive at the time of the commencement of the suit before the justice and the rendition of the judgment therein. It appeared that Morgan recovered the judgment before a justice in the name of H. M., his brother, but that the brother had no interest in it. The court in that case, by Cowen, J., said: "It was said by counsel in behalf of the motion that a party and juror having married sisters would be no cause of challenge, but I presume hastily, for it is put among the commonest cases in the books as an instance of affinity which disqualifies. It was holden very early, on writ of error to parliament, that the sheriff's wife, being a sister to the plaintiff's wife, was good cause of principal challenge to the array: *Markham v. Lee*, cited in *Mounson and West's Case*, 1 Leon. 89.

We are free to confess that the question involved is somewhat subtle, far from being clear of difficulty, and the only means by which we have been enabled to solve it, as we think, has been by keeping steadily in view the principle as held in most of the cases referred to, and by looking entirely beyond and outside of it for the real merits of the question. The proposition is that "affinity arises from marriage only, by which each party becomes related to all the *consanguinei* of the other party to the marriage, but in such case these respective *consanguinei* do not become related by affinity to each other." It is said in *Higbe v. Leonard*, 1 Denio, 186, that "a husband is related by affinity to all the *consanguinei* of his wife, and *vice versa* the wife to the husband's *consanguinei*; for the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. It is contended that according to this rule, the respondent can not be in any manner related to the defendant Egner, inasmuch as his wife is only related to him by affinity, and that consequently to hold that an affinity exists as between them, would be in effect to put one affinity upon another, and that the

law does not sanction such a process. This, it must be conceded, is plausible, and the rule itself, if strictly confined to its letter, and at the same time so construed as to exclude the idea of a further extension, would strongly incline to such a result. But in holding that the *consanguinei* of the respective parties to the marriage do not become related to each other either by consanguinity or affinity, it does not follow that the immediate parties themselves may not become related, not only to the *consanguinei* of each other, but also to all such of their relations as may arise from the tie of affinity. If the tie of affinity exists at all between the husbands of the aunt and niece, and that it does would seem to be established by the case of *Mounson and West*, *supra*, then it is that it must arise out of the rule as laid down in respect to the *consanguinei* of the respective parties to the marriage, when thus extended so as to embrace the relations contracted by the parties themselves. That the immediate parties to the marriage, by the very act of entering into that relation, impart properties to each other which simultaneously run through all the ramifications of each other, would seem necessarily to result from the origin and nature of the institution of marriage itself, and also from the theory which the common law has entertained in reference to it from the earliest period of bible history down to the present day.

When the woman, which was made of one of the ribs of Adam, was brought and presented to him in Paradise, he said, "This is now bone of my bone and flesh of my flesh; she shall be called woman, because she was taken out of man:" See Genesis, c. 2, v. 23. The same notion of identity or unity is kept up and carried out by my lord Coke, Co. Lit. 112, when he says that "by marriage the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection, and cover she performs everything, and is therefore called in our law, French, a *feme covert*, *fœmina viro co-operata*, is said to be covert baron, or under the protection and influence of her husband, her baron or lord, and her condition, during her marriage, is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage. For this reason, a man can not grant anything to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to

covenant with her would be to covenant with himself: *Id.*; 1 Bla. Com. 442. It is upon the principle of a complete merger or incorporation of the very being and existence of the wife in that of her husband, and upon that alone, that the relationship contended for can be conceded. The act of marriage, therefore, though creating a private relation, can not be said, in strictness, to create any relationship either by consanguinity or affinity; because those relations presuppose a separate legal existence between the parties thus related, which, as we have shown, is not the case in respect to husband and wife. We think, therefore, that, by the marriage of the respondent with the niece of the defendant's wife, he placed himself in the same degree of propinquity to all the relations of his wife in which she actually stood towards them, and that consequently he falls within the fourth degree of affinity to the defendant Egner. If we are correct in this, and that we are we feel satisfied, then it is that the respondent is incompetent to preside in the cause, and consequently acted correctly in refusing to do so. The demurrer to the answer is therefore overruled, and the rule discharged.

DEGREES OF CONSANGUINITY AND AFFINITY, HOW COMPUTED.—Consanguinity is the connection or relation of persons descended from the same stock or common ancestor; that is, having the blood of some common ancestor. It is either lineal or collateral: 2 Bla. Com. 202; Bingham on Descents, 298; 1 Broom & Had. Com. 644; Abb. Law Dic., tit. Consanguinity; Bouv. Law Dic., *Id.*; Rapalje & L. Law Dic., *Id.*; Burrill's Law Dic., *Id.*; *Blodget v. Brinsmaid*, 9 Vt. 27; *Sweezy v. Willis*, 1 Bradf. 495; *McDowell v. Addams*, 45 Pa. St. 432.

Lineal consanguinity is that which subsists between persons of whom one is descended in a right line from the other, as between the son, the father, and the grandfather, in the ascending line, and between the father, son, grandson, and so on downward, in the descending line.

Collateral consanguinity is that which exists between persons who lineally descend from the same ancestor, who is the *stirps*, or root, but who do not lineally descend from each other. For example, brothers and their issue are respectively connected with each other collaterally, as they have descended from the same father lineally, but not from each other. See authorities *supra*. Affinity is the connection existing in consequence of marriage, between each of the married persons, and the kindred of the other. A husband is related by affinity to all the *consanguinei* of his wife, and the wife is so related to all the *consanguinei* of her husband; but this relation does not exist at all between the *consanguinei* of the respective parties: Bouv. Law Dic., tit. Affinity; Abb. Law Dic., *Id.*; Rapalje & L. Law Dic., *Id.*; Burrill's Law Dic., *Id.*; 1 Bla. Com. 434; 1 Broom & Had. Com. 528; *Paddock v. Wells*, 2 Barb. Ch. 331; *Carman v. Newell*, 1 Denio, 25; *Higbe v. Leonard*, *Id.* 186; *Spear v. Robinson*, 29 Me. 545; *Solinger v. Earle*, 45 N. Y. Super. Ct. 84; *Waterhouse v. Martin*, Peck, 390; *Bernard v. Vignaud*, 10 Mart. 562; *Blodget v. Brinsmaid*, 9 Vt. 30.

Relationship by consanguinity or affinity is reckoned by degrees, and for the purpose of computing those degrees there are two great systems known to the law: that by the canon law, which has been adopted by the common law; and that by the civil law. The method of computing those degrees by the canon law is by beginning at the common ancestor and counting downward to the two persons, or to the one the most remote, and whatever number that is, counting each person a degree, that is the degree in which they are related to each other. For example, Titius and his brother are related in the first degree, for from their father, who is their common ancestor, down to either of them is one degree. Titius and his nephew are related in the second degree, for from Titius' father, who is their common ancestor, down to the nephew, who is the most remote, is two degrees.

The method of computing those degrees by the civil law was to commence at either of the persons whose relationship was to be determined, and count up to the common ancestor and then downward again, counting each person a degree, to the other person. For example, Titius and his brother are related in the second degree, for from Titius up to his father, who is their common ancestor, is one degree, and then down to Titius' brother is another. Titius and his nephew are related in the third degree, for from Titius up to his father is one degree, and from the father down to the nephew is two degrees: 1 Broom & Had. Com. 646; 2 Kerr's Bla. Com. 457; 3 Redfield on Wills, 84; *McDowell v. Addams*, 45 Pa. St. 432; *Paddock v. Wells*, 2 Barb. Ch. 331; *Spear v. Robinson*, 29 Me. 543; *Sweeney v. Willis*, 1 Bradl. 495; Bingham on Descents, 298; 4 Kent's Com. 412; Co. Lit. 23 b.

The above rules of computation, of course, relate to collateral consanguinity, as the lineal degrees from father to son or from son to father, etc., being so plainly marked, are computed in the same manner by both systems: Co. Lit. 23 b.

SCULL v. EDWARDS.

[13 ARKANSAS, 24.]

PROMISSORY NOTE MADE PAYABLE TO MAKER OR ORDER, and by him indorsed to another, is but an ordinary promissory note, because until such indorsement it has no validity as such note.

INDORSEE OF NOTE PAYABLE TO MAKER OR ORDER acquires a primitive title and not derivative, and the indorsement to him is not technically such, but is part of the instrument itself.

WHEN PARTY SUES MAKER OF PROMISSORY NOTE upon a note which was made payable to maker or order and indorsed by him to the party suing the maker's prayer for oyer is satisfied by setting out the note together with the indorsement.

ASSUMPSIT. Scull & Bro. made their promissory note payable to their own order, and indorsed it to Mygate & Edwards, and this note, not being paid, Edwards the surviving partner of the indorsee, brought suit upon it. Defendants demanded oyer, which the record states was granted, but in what manner does not appear, and the instrument itself does not appear in the record, until copied into the bill of exceptions. Upon the trial

judgment went for plaintiff, and defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and that the court erred in instructing the jury. The motion was overruled, and defendant excepted. The bill of exceptions contained a copy of the instrument declared upon, together with the indorsement in full. Defendants' counsel objected to said instrument being read to the jury, because it varied from the instrument described in the declaration. The court overruled this objection, and defendant excepted. Defendant asked that the jury be instructed—1. That the allegations in the declaration and the proof must agree. 2. If there is a material variance between the allegations in the declaration and the proof, the jury will find for defendants. 3. A promissory note is a writing which contains a promise of the payment of money to another, at or before a time specified, in consideration of value received by the promisor. The court refused to give such instructions, but told the jury that under the declaration the instrument offered in evidence is sufficient to enable the plaintiff to recover. Defendants duly excepted and took this appeal.

English, for the appellants.

Watkins and Curran, contra.

By Court, SCOTT, J. Where one makes a promissory note payable to his own order, and then indorses and delivers it to another, he has, in legal effect, but made an ordinary promissory note at last by all this circumlocution; because, until indorsed, the instrument is imperfect, and has no validity as a promissory note. The first indorsee, then, does not take a derivative but a primitive title, and therefore the indorsement as to him, in that case, is not technically such, but a part of the instrument itself, thus made valid: *Lee v. Branch Bank of Mobile*, 8 Port. 124, and *Roach v. Ostler*, 1 Man. & Ry. 120, there cited. It would be otherwise in a case where a firm made a promissory note to one of its members who indorsed it; and in such case the indorsee would take a derivative title, as to all the other members at least, although even in that case, the note could not be sued on at law before the indorsement: *Smith v. Lusher*, 5 Cow. 688, 708.

The grant ofoyer in the case at bar, both of the body of the instrument and of the indorsement thereon to the plaintiff below, was therefore strictly responsive to the prayer ofoyer for "the writing sued," and placed the latter upon the record

in the same sense that it did the former, the two together, in legal effect, constituting the writing itself, on which the plaintiff below sought the recovery in his primitive title set out in the declaration. And when afterwards, at the final trial, it appears, as the bill of exceptions shows, that the plaintiff read "in evidence the following instrument of writing, it being the same given on oyer, and which is in the following words and figures, to wit," etc. (setting out, in *hæc verba*, not only the body of the note, but the full indorsement thereon), we can not intend, in the face of such a record, that the indorsement was in fact not read in evidence, but must conclude, as is manifestly true, that it was read in evidence. And when we do so, it is not only clear that the verdict and judgment are fully sustained by the evidence, but that there was no error in the refusal of the court below to give the first two instructions asked; because, there being evidence in or want of evidence upon which to found any pretext for variance between the allegations and the proof, they were purely abstract; there being no more necessity to prove a distinct date for the assignment in this case than there would be to prove two dates to any one ordinary promissory note alleged to have been executed on one certain day only. Nor was there any error in the refusal to give the third, because in its terms it was not, in strictness, law, and was calculated to mislead the jury. Nor was there any error in the instruction given.

All three of the grounds, then, upon which the motion for a new trial was made, being wholly unsustained by the record, and in no other wise supported than upon very technical and flimsy grounds, in a matter of plain indebtedness, where no defense at all was offered on the merits, we shall not only affirm the judgment of the court below with costs, but award the appellee five per centum damages on its amount.

PROMISSORY NOTE MADE PAYABLE TO ONE'S OWN ORDER becomes a complete contract upon being indorsed by him, but not till then: See note to *Pitcher v. Barrows*, 28 Am. Dec. 309. See also Daniell on Neg. Inst., sec. 130, and numerous cases cited in note.

PATTERSON v. JONES.

[13 ARKANSAS, 69.]

IF CONTRACT FAILS TO STATE PLACE WHERE PAYMENT IS TO BE MADE, the law fixes that at the residence of the promisor.

DECLARATION THAT DEFENDANT AGREED TO DO CERTAIN THING at a specified time and place is sufficient without alleging demand and refusal, as in order to excuse himself defendant must show in his plea either that he did the thing agreed to be done, or that he was ready to do it.

COVENANT brought by defendant in error for the non-performance of an agreement to pay two hundred cords of ash wood on or before June 1, 1850. The declaration set out the instrument, and simply alleged its non-performance. Defendant demurred to this declaration, as it did not state that notice to deliver or demand of payment had been made. The court overruled the demurrer, and from a judgment in favor of plaintiff defendant took this appeal.

English, for the plaintiff.

Pike and Cummins, contra.

By Court, WALKER, J. The defendant covenanted to pay two hundred cords of ash wood or its equivalent on a given day. As no place of payment is mentioned in the contract, the law fixed that at the residence of the party by whom the payment was to be made. The contract was unconditional, and when time and place were thus fixed, the question is, Did it at once devolve upon the party promising to pay to do so or excuse himself by showing a readiness and offer on his part at the time and place thus ascertained? or was it necessary for the plaintiff, in order to maintain his action, to demand of the defendant the property? and in addition to his statement of the contract, and alleging its breach, should he be required also to aver and prove a demand and refusal to pay the property? It is sufficient in pleading for the plaintiff to show a legal obligation on the defendant, and to aver that he has failed to perform it. And we think, in this instance, that he has done so. The obligation on the defendant to pay was complete and unconditional. To demand of him to pay the cord-wood was but to require of him to do what the law enjoined and what his contract required of him. His legal liability having been fixed by law, he was required to perform or tender and offer to perform. This is matter of defense to be interposed by the defendant: *Hoys v. Tuttle*, 8 Ark. 129 [46 Am. Dec. 309]; *Hughes v. Sloan*, Id. 146; *Trabue v. Kay*, 4 Bibb, 226; *Johnson v. Butler*, Id. 97; *Tiernan v. Napier*, 5 Yerg. 410.

The circuit court, therefore, did not err in overruling the demurrer to the plaintiff's declaration.

Let the judgment be affirmed.

PLACE OF PERFORMANCE OF CONTRACT: *Currier v. Currier*, 9 Am. Dec. 43, and note; 2 Whart. on Cont., sec. 871 et seq.

SPECIAL REQUEST OF PAYMENT IS UNNECESSARY when the time and place are fixed by the contract: *Roberts v. Beatty*, 21 Am. Dec. 410, and note; *Mitchell v. Gregory*, 4 Id. 655. But see *Beniers v. Howard*, 1 Id. 553, where the court held that on a promise to deliver goods a demand before action brought is indispensably necessary. See also note to that case.

MAULDING v. SCOTT.

[13 ARKANSAS, 88.]

ANY GIFT OR BEQUEST OF CHATTEL, NO MATTER HOW LONG THE TIME, passed the title at common law; but this rule has been relaxed.

GIFT OF CHATTEL FOR LIFE, LIMITATION OVER TO SUBSEQUENT DEVISEE, is good, provided such life estate be clearly expressed; but whatever will constitute, directly or constructively, an estate tail in lands will pass an absolute estate in personal property.

WORDS "LAWFUL HEIRS," "HEIRS OF THE BODY," ETC., ARE TECHNICAL WORDS used in creating an estate in tail, and when used by the testator to indicate the one who is to take, after the determination of the life estate, are generally regarded as words of limitation, and will pass an absolute title to personal property.

ABSOLUTE ESTATE IN CHATTELS.—A clause in a will which recites, "I also bequeath to my daughter, Sukey Mills, my negro girl Cynthia, to be enjoyed by her during her life-time, and then to descend to her lawful heirs, together with Cynthia's increase," conveys an absolute estate in the chattel.

COMPLAINANTS HAVING ASKED FOR RELIEF AS HEIRS OF A. can not recover as the heirs of B., although the proof adduced shows them to be such, as they can only recover on the validity of their title stated in their bill.

THE bill in this case, brought by Scott and others as the heirs of Susan Mills, alleges that Thomas Humphreys, the father of Susan Mills, bequeathed to her a negro girl, in the words as stated in the opinion, and that Maulding's ancestor, with knowledge of the tenure of Susan Mills, bought the slave at a low price; and prays that the negro, Cynthia, and her child, be returned to complainants. The answer substantially denied each of the allegations in the bill. Complainants obtained a decree, and defendants took this appeal.

Pike and Cummins, for the appellants.

F. W. and P. Trapnall, contra.

By Court, WALKER, J. The complainants, as heirs of Susan Mills, filed their bill in chancery against the defendants to recover a negro woman and child, which they claim as devisees of

their grandfather, Thomas Humphreys. They state that by the will the woman slave, Cynthia, was devised to their mother, Susan Mills, to be enjoyed by her during her life-time, and to her heirs after her death, and that she is dead, leaving them her heirs. The clause of the will under which they claim the slave and her child is in the following words: "I also bequeath to my daughter, Sukey Mills, my negro girl Cynthia, to be enjoyed by her during her life-time, and then to descend to her lawful heirs, together with Cynthia's increase, should she have any."

At common law there was no remainder to a chattel interest, and any gift or bequest of a chattel, no matter how short the time, passed the absolute property. This rule was gradually relaxed, and a distinction taken between a gift of the thing itself and of the use of the thing, the law attaching a validity to the latter which it denied to the former. This modification of the common-law rule in time also gave way to the rule, as we now understand it to exist, that whether the gift be of the thing itself for life, or only of the use of the thing, a limitation over to a subsequent devisee, after the decease of the first taker, will be supported. Such life estate or use, however, must be clearly expressed; for it has been decided, with great unanimity, not only by the English and American courts, but also by this court, that whatever will directly or constructively constitute an estate in tail in lands will pass an absolute estate in personal property. Chancellor Kent, in his Commentaries, vol. 2, pp. 352, 353, says that "chattels or money may be limited over after a life interest, but not after a gift of the absolute property; nor can there be an estate tail in a chattel interest, for that would lead to a perpetuity, and no remainder over can be permitted on such a limitation. That it is a settled rule that the same words which, under the English law, would create an estate tail as to freeholds give the absolute property as to chattels."

The words "lawful heirs," "heirs of the body;" etc., are the technical terms used in creating an estate in tail, and when used in executory devises, in connection with the other language employed, the important inquiry often is, whether they are to be taken as words of purchase, giving to the person thereby designated an estate to commence in possession at the death of the devisee for life, or whether they are to be taken as words of limitation attaching to the previous estate, and enlarging it from an estate for life to an estate tail, which would give to the first devisee the absolute property. If the words "heirs," or "heirs of the body," are used by the testator to denote the second devisee,

or one who is to take after the life estate is determined, and there are no other words in connection with them tending to show that they are used as words of purchase, they will always be taken as words of limitation, and when personal property is devised will vest in the first devisee the absolute estate. It is not necessary, however, that this qualifying language should stand in immediate connection with the words "heirs," or "heirs of the body;" if found anywhere in the instrument used as a conveyance, and in connection with these words, it clearly and plainly denotes an intention to restrict the limitation over to the death of the first devisee. The technical sense in which these words would otherwise be taken should not prevail, but should yield to such intention thus clearly ascertained.

In the case of *Moody v. Walker*, 3 Ark. 147, several of the questions now under consideration were discussed, and the English and American decisions reviewed. The examination which we have made of these and several more recent decisions adds to our conviction that the law was correctly expounded in that case. One or two of the numerous cases cited may serve to show the extent to which several of the courts of the United States have gone.

In *Horne v. Lyeth*, 4 Har. & J. 431, a searching review is taken, by Chief Justice Dorsey, of *Shelley's Case*, and most of the English decisions. In the case of *Horne v. Lyeth*, the devise was to the daughter during her life, and after her decease, "I give the same to the heirs of my said daughter Catharine." It was held that the daughter took a fee simple, not a life estate in the property.

In *Dott v. Cunningham*, 1 Bay, 453 [1 Am. Dec. 24], a deed was made to Sarah Dott for a slave to be held during her life, and at her death to the heirs of her body. It was held that the words "at her death to the heirs of her body" were words of limitation, not of purchase. The court say: "What, then, is the plain and obvious construction of the law upon the words of this deed? The answer is plain, that the estate being given to Mrs. Dott for life, with remainder over to the heirs of her body, makes it an estate tail executed, which, being of a chattel interest, is too remote. The whole estate vested in Mrs. Dott, the first taker; consequently, being her property, the second husband acquired a right to it by marriage." [The language here quoted is not in the opinion in the case referred to, but is contained in a note of Mr. Justice Bay appended to the case in his report.—ED. AM. DEC.]

In *Floyd v. Thompson*, 4 Dev. & B. L. 478, it was held that a bequest "for the use and benefit of a daughter during her natural life, and then to descend to the heirs of her body if any, if none, then to her lawful heirs," gave the daughter an absolute estate in the slaves.

In *Watts v. Clardy*, 2 Fla. 369, the language was "loan the negroes during her natural life, and at her death to the heirs of her body, which shall survive her, to be equally divided amongst them." The supreme court of Florida held that the daughter took an absolute estate in the slaves.

These are stronger cases than the one under consideration, and indeed stronger than several cases where the language has been held sufficiently strong to vest a life estate in the first devisee, with a limitation over to the heir. Such would seem to be the construction given by the court of appeals of Kentucky: *Prescott v. Prescott*, 10 B. Mon. 56.

At first view, these appear to be strong cases, in which an obvious intention of the testator might be deduced from the language used. It must be remembered, however, that the will of the testator and the policy of the law often conflict. The testator, in his anxiety to perpetuate his property in a line of succession, invades that policy of the law which discountenances perpetuities. Before the statute *de donis*, the courts, seeing the evils which attended entailments, had done much to lessen it by rigid construction. After that statute, fine and recovery were resorted to, to avoid the effect of entailments; and as the statute did not extend to executory devises, they could not be barred by fine and common recovery; and hence a date of limitation arose both in regard to devises of real estate and chattels. It is in the protection of this policy that the apparent hardships arise. A series of adjudications have established a definite meaning to these words, until they have become a rule of property which we should be careful not to invade. There is nothing in this devise to limit or qualify the words "lawful heirs." It follows, therefore, from the premises assumed, that Susan Mills acquired under the will of her father, Thomas Humphreys, not a life estate as contended for by complainants, but an absolute property in the slave Cynthia, which property passed at once to and vested in her husband, Ambrose Mills, and at his death became the property of his devisees, if he made a will, or in the absence of a will, to his widow and children under the statute of descents.

The counsel for the complainants have anticipated the decision

of the court on this point, and contend that, although they may not be entitled to the slaves as devisees of Thomas Humphreys, yet if it be found that Susan Mills took the absolute estate in the slaves, they vested absolutely in her husband, and that on his death they acquired title to the slaves as his heirs at law. This may, in the absence of a will and other children by some other marriage, be all true. But the question is, Have they presented such a state of facts in their bill as will entitle them to a decree in this particular case? Are these facts put in issue by the bill and answer? We think not. In the first place, they claim exclusively under the will of their grandfather, and state that they are the heirs of Susan Mills; but this is merely to identify themselves as the devisees. They profess to have derived title directly from Thomas Humphreys, under his will. How, then, can they prove that they are the heirs of Ambrose Mills? That fact was not put in issue, and nothing is evidence but what tends to prove some material fact in issue.

Not only this, but they expressly state that Susan Mills had only a life estate, and that she and her husband never claimed any other estate, which estate they charge terminated at the death of their mother. It is manifestly clear that this allegation can not be contradicted by them. *Gresley on Equity Evidence*, p. 165, says: "For parties to disprove facts which they have themselves admitted would be a mere mockery; the plaintiff would be repudiating the statements which he had laid down as the basis for his demand for justice;" and at page 159 he says: "The main object of allowing pleadings at all is, that the disputed points may be brought to issue clearly and definitely, and this object would be entirely frustrated if, after the pleadings were closed, the questions were permitted to be repeatedly altered."

In the case of *Piatt v. Vattier*, 9 Pet. 405, in which the statute of limitations was relied on, and it became important for the complainants to establish the non-residence of the party, and proofs were taken to that point: held, by Story, J., that the court could take no notice of the proofs, for the proofs, to be admissible, must be founded upon some allegation in the bill and answer, and the bill was dismissed. The grounds of equity should be stated with clearness and precision; for the complainant can only recover on the validity of his title stated in the bill: *Lingan v. Henderson*, 1 Bland, 249. He must stand or fall upon the case made by his bill: *Thomas v. Warner*, 15 Vt. 110; *Wright v. Dame*, 22 Pick. 55; *Gibson v. McCormick*, 10

Gill & J. 65; *Lucas v. McBlair*, 12 Id. 1. A fact not alleged, though proven, can not be the basis of a decree: *Morrison v. Hart*, 2 Bibb, 4 [4 Am. Dec. 663].

These authorities abundantly show that no decree can be rendered for the complainants, admitting it to be in proof that they are the sole heirs of Ambrose Mills, and that he died intestate, for there is not a material fact put in issue by the pleadings to which the evidence could apply, or on which a decree could be based. If the complainants have equitable rights, as heirs of Ambrose Mills, they must assert them in another suit. This is not a suit where a title is defectively stated; but where the grounds upon which rests the claim to equitable relief had been entirely misapprehended.

Let the decree of the court below be reversed and set aside, and the bill dismissed, without prejudice to the rights of complainants.

WORD "HEIR," OR "HEIRS," IS NOMEN COLLECTIVUM, not a word of purchase, and carries the land not only to the immediate heir, but to all those who descend from that devisee; and a devise to one and his heirs forever, "except she should die without an heir born of her own body," then to B., creates an estate tail, with a remainder over; but personal property so bequeathed passes an absolute title to the first taker: *Roach v. Martin*, 27 Am. Dec. 746. So in *Duncan v. Martin*, Id. 525, a bequest of personalty to a woman and the "heirs of her body lawfully begotten," was held to vest the entire estate in the first taker. See also the note to that case, where the subject is discussed.

PERSONAL PROPERTY MAY BE LIMITED OVER BY WAY OF REMAINDER, after a bequest of the same for life: *Westcott v. Cady*, 9 Am. Dec. 306; *Griggs v. Dodge*, 2 Id. 82, and note.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Fenno v. Coulter*, 14 Ark. 38.

STATE v. PAUP.

[13 ARKANSAS, 129.]

EVERY ONE IS PRESUMED TO KNOW THE LAW. The maxim, *Ignorantia juris non excusat*, is applicable to civil as well as criminal jurisprudence, and recognized in equity as well as at law; and a departure from it, under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired.

IF TWO PARTIES ENTER INTO CONTRACT UNDER MISTAKE OF LAW, equity will relieve upon the ground of surprise; and if one party is mistaken as to the law, and the other, with knowledge, contracts with him, it will relieve upon the ground of fraud.

COURTS HAVE TRIED TO UPHOLD MAXIM THAT IGNORANCE OF LAW shall not excuse, but in cases of peculiar hardship they have distinguished between ignorance of the existence of a law and of its legal effect.

PARTIES WHO ENTER INTO CONTRACT UNDER MUTUAL MISTAKE as to the legal effect of a law will be relieved in a court of equity.

BILL for injunction to restrain the collection of note or bonds given to the state for the purchase price of certain lands conveyed by act of congress to the state of Arkansas. By this act of congress, land, not to exceed two entire townships, was conveyed to the state, for the purpose of assisting in the foundation of a seminary of learning. In 1840 the legislature of Arkansas passed an act appointing the governor agent of the state, with power to sell and locate said lands "in legal subdivisions of not less than one half quarter-section." A short time after, the governor advertised a sale of said lands "in legal subdivisions in not less than one half quarter-section," and giving authority to the purchaser to locate said land upon any unappropriated lands of the United States within the state. At such sale, defendant Paup purchased the right to locate five hundred and twenty acres of said land, and gave in payment therefor the notes which are the subject of this suit. Paup afterwards proceeded to locate his claims upon separate, unconnected eighty and one-hundred-and-sixty acre tracts, which the United States land officers refused to allow or confirm, as the lands should have been selected in one body. Suit was brought upon the notes, and Paup filed his bill for relief, alleging the above facts, and that he relied upon the act of the legislature and the proclamation of the governor that he could locate unconnected eighty-acre tracts. A perpetual injunction was decreed, and the state appealed.

Cummins, for the state.

Pike, for the defendant.

By Court, WALKER, J. The grounds of relief relied upon in this case are that the contract, when entered into, was intended to effect a particular object, which, owing to a misapprehension of the law, has failed, and is of no value to the purchaser.

Every one is presumed to know the law, and whether this is true or false in point of fact, like most other great principles or starting points in science, it must be received and acted upon as true. The maxim, *Ignorantia juris non excusat*, is applicable to civil as well as criminal jurisprudence, and recognized in courts of chancery as well as at common law. A departure from it, under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired. Judge Story and Chancellor Kent have each elaborately discussed this sub-

ject. The first, in his commentaries on equity, thus closes his investigation, at page 151, volume 1: "We have gone over the principal cases which are supposed to contain contradictions of or exceptions to the general rule, that ignorance of law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases which are inconsistent with the rule, it may be affirmed that the real exceptions to it are few, and generally stand upon some very urgent pressure of circumstances."

Chancellor Kent, upon the same subject, says: "Courts do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind:" *Lyon v. Richmond*, 2 Johns. Ch. 60.

Judge Catron, in the case of *The Bank of the United States v. Daniel*, 12 Pet. 55, said: "The remedial power claimed by courts of chancery to relieve against mistakes of law is a doctrine rather grounded upon exceptions than upon established rules."

It would be a useless consumption of time to multiply authorities upon this subject: as a rule to be cherished as of vital importance in the administration of the law, there can be no doubt, and exceptions, when made, should, for their merits and peculiar circumstances, clearly show the necessity of an exception.

We will next give attention to the cases which have been held exceptions to this very general rule.

In the case of *Bingham v. Bingham*, 1 Ves. sen. 126, the plaintiff purchased property to which, by law, he was entitled, but was ignorant of his legal right. Upon a bill filed for that purpose, it was decreed that the purchase money should be refunded to him.

Willan v. Willan, 16 Ves. 72, was a case where relief was granted because it was, as said by Lord Eldon, impossible that the parties could have understood the effect of the covenant: he said it was a matter of surprise upon both, and decreed a rescission of the contract.

In *Hopkins v. Mazyck*, 1 Hill (S. C.) Ch. 242, the court distinguished between ignorance and mistake of law. Ignorance, says the court, can not be proved, and for that reason the court can not relieve against it. But not so in regard to a mistake of law. That is sometimes susceptible of proof, and in conclusion

they say: "Mistakes as to matters of fact have always been regarded as relievable, upon clear, full, and irrefragable proof, and mistakes in law ought to be upon the same footing, when the proof is equally certain."

In *Hitchcock v. Giddings*, 4 Price, 135, the court of exchequer decided that, where a vendor, through ignorance and mistake, agreed to sell property in which he had no interest at the time of the sale, the contract should be rescinded.

In *Fitzgerald v. Peck*, 4 Litt. 127, Peck, under a misapprehension as to the amount of his legal liability, executed his notes for more than he was in law bound to pay; the court say: "If Peck, then, can be relieved upon any ground, it must be that which the court below has assumed, that is, the ground of a mistake as to what he was really bound to pay," and the court granted the relief prayed.

In *Hall v. Reed*, 2 Barb. Ch. 503, the ground set up for a rescission of the contract was ignorance of the existence of a statute declaring two thousand pounds avoirdupois a ton, contrary to the usage of the country and the common understanding and the understanding of the complainant when he entered into the contract. The chancellor, in this case, said: "The allegation of ignorance is put in issue by the answer. And I do not know of any means of proving his ignorance of the existence of a statutory provision, which the law presumes every citizen of the state to be acquainted with, who has arrived at the years of discretion. I can imagine a case in which the party holding the affirmative of the fact may give such evidence as will satisfy a reasonable man that he acted under a mistake of law. And courts have sometimes granted relief in such cases, where it could be done without impairing the rights of those who are not aware of the existence of such mistake when their right accrued." In this case a distinction is taken between "ignorance of the law" and "mistake of the law;" and this distinction was also taken in *Lawrence v. Beaubien*, 2 Bail. L. 623 [23 Am. Dec. 155]; and by Senator Paige, in *Champlin v. Laytin*, 18 Wend. 423 [31 Am. Dec. 382]. In *Laytin v. Champlin*, 1 Edw. Ch. 467, it was held that a contract entered into under a material misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it can not be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact. In this case the parties were advised of a prior conveyance, but mistook its legal effect. The court is very clear and explicit, both in the grounds assumed and the reasons for

assuming them. Both parties were equally mistaken in the law, resulting from the previous transfers. The court states the general rule fully, that ignorance of the law excuseth no man; and then say: "Yet there are cases in which this court will interfere upon the ground of such mistake, in order to relieve a party from the effect of a contract. As, for instance, if one is ignorant of a matter of law involved in the transaction, and another, knowing it to be so, takes advantage of such circumstance to make the contract, here the court will relieve, although perhaps more properly on account of fraud in the one party than of ignorance of law in the other."

So, if both parties should be ignorant of a matter of law, and should enter into a contract for a particular object, the result whereof would, by law, be different from what they mutually intended; here, on account of the surprise, or immediate result of the mistake of both, there can be no great reason why the court should not interfere in order to prevent the enforcement of the contract, and relieve from the unexpected consequences of it. To refuse, would be to permit one party to take an unconscientious advantage of the other, and to derive a benefit from a contract which neither of them intended it should produce.

There are a few other cases sustaining the exception to the general rule, but the books in which they are reported are not within our reach. In presenting the cases above, we have preferred to give the language of the courts touching the point at issue, that the precise ground on which each exception rested might be more clearly understood.

It will be seen that several of them distinguish between mistakes arising from ignorance of the existence of the law, and such as arise in cases where the law was known to exist, but the contract made under a misapprehension of its legal effect, denying all relief in the first instance, not because the injury itself may not be as great, but because of the presumption that every man knows the public laws of the country, and the general if not invariable impossibility of proving a negative, which may be locked up in the bosom of the party chargeable with such knowledge. In the second instance, as to the legal rights of the parties, when misconceived under the law, they suppose the facts susceptible of proof in many instances, and when it is established that such was the case, and that injury has resulted to one or both of the parties, which may be relieved against consistently with other general principles of equity, relief is granted.

In other cases, a distinction has been taken between contracts entered into for a particular purpose and others; and where such particular object or purpose fails, relief is granted. And also in cases where the party, under a mistake of law, sells that to which he has no title; and this is placed merely on the ground of a total failure of consideration. These are the most plausible grounds assumed for a departure from the general rule, the importance of which seems to be fully recognized. There appears to have been an effort by the courts to uphold the maxim that ignorance of the law shall not excuse, and at the same time, in cases of peculiar hardship, they have made distinctions between ignorance of the existence and of the legal effect of the law, and also of contracts for a special purpose and a general purpose, which, however plausible, when carefully considered, are infringements upon the maxim, and are allowed rather because of the hardship of the particular case and the facilities for proving it, than upon principle.

With these remarks, we will proceed to examine the facts of the case before us, and see to what class it belongs, and to what extent, if any, relief should be granted.

Notwithstanding the alleged ignorance of the law, it evidently does not belong to the first class of ignorance, that is, ignorance of the existence of the law. The contract refers directly to the law of congress. The nature of the grant implies it, and the letter of the complainant given in evidence proves it beyond all doubt; and as regards a mistake about the quantity required to be entered according to the provisions of the law, there can be as little doubt: for, in the letter of the complainant to the governor, when in treaty for the land, he says: "The law requires that locations shall be made in tracts not less than six hundred and forty acres. As I have located that number of acres, I can also legally locate adjoining any number of acres less than six hundred and forty acres." The impression of the complainant, as ascertained from this letter, was, that as he had already entered six hundred and forty acres he could enlarge his location on an adjoining tract by adding to it, even though the second location should be a less quantity than six hundred and forty acres. If, therefore, there was any misapprehension in this case, it must have consisted in this only, for by this letter he distinctly recognized two restrictive features of the act of congress: one, that not less than six hundred and forty acres could be located in one connection; the other, that the second entry or location must be contiguous and in connection with the

former, and not in detached tracts, as he has asserted in his bill; so that, in this respect, there could have been no misapprehension produced either by the act of the legislature or by the notice of the governor: which provision in the act was probably intended to relate to the sale of the lands after location, and not to the tracts to be located. Concede the act (as it is) to be somewhat vague and indefinite, still this complainant seems to have been in no respect deceived or mistaken, unless it should be in regard to his power to locate a less quantity than six hundred and forty acres. In this respect, there can be no doubt, from the nature of the transaction, that both the governor and the complainant labored under a misapprehension. The governor had no interest in the transaction; he could therefore have no motive to deceive the purchaser. It was a contract in behalf of the state, and it is not to be presumed that a state would intentionally wrong her citizen. The purchaser must have been aware that, unless he could make the location, the contract was worthless to him, and therefore he could not have intentionally made a contract wholly valueless to himself.

That the law forbid the entry is evident from the language of the act of congress, as well as from the decision of the land officers, and the opinion of the commissioner of the general land office. Indeed, it has been decided by the supreme court of the United States that the decision of the land officers of the proper land office is final. But if not, surely the purchaser was no more bound to appeal from their decision than to apply for a special act of congress for relief. The moment his application was presented and definitely rejected, the law of the case, so far as his power to locate a less quantity than six hundred and forty acres was concerned, was definitely settled.

The result of the matter is this: the state attempted to confer power on the purchaser to do that which was forbidden by law, which she had herself no power to do, and of course could delegate no greater authority to her agent. What, then, did the purchaser get by his contract? Not property; for the state had no property in lands until they were selected and affirmed to her. He at most only got a floating right, which floating right was, however, dependent upon a condition precedent, which at the time of the making of the contract was contrary to law, and therefore impossible to be performed, for unless the purchaser could locate the float, it was utterly worthless. It was not property or other valuable thing; it was not even that which might secure a valuable thing. This, then, is a peculiar case,

stronger, perhaps, than any found in the books, in this: that it is not even a direct contract for property, but a contract for property dependent on a precedent unlawful act. Under a clear misapprehension of the legal effect of the contract, the complainant executed his note to the state for this and no other consideration. The question is, Shall we permit the state to go on and collect this money from the purchaser when she gave no consideration whatever, and has lost nothing? We say, lost nothing; because it is evident that she never did part with her right to locate this five hundred and twenty acres of land: the contract was void against law, and consequently the title remained in her. If she has been delayed in selecting other lands, it has been the result of her own misapprehension of the law, and should not prejudice the complainant's claims to equitable relief.

In view of the whole case, we think complainant was entitled to the relief prayed in his bill.

Finding no error in the decree of the circuit court, the same is in all things affirmed with costs.

EXTENT TO WHICH COURT OF EQUITY WILL RELIEVE AGAINST MISTAKE OF LAW: See *Storrs v. Barker*, 10 Am. Dec. 316, and note 323; *Lawrence v. Beaubien*, 23 Id. 155, and note 164, where the distinction is made between ignorance and mistake of law. This distinction is also maintained in *Champion v. Laytin*, 31 Id. 382, and note. See also *Norton v. Marden*, 32 Id. 132; *McNaughten v. Partridge*, 38 Id. 731; *Trigg v. Read*, 42 Id. 447; *Hart v. Roper*, 51 Id. 425, and the notes to the above cases.

THE PRINCIPAL CASE IS CITED in *McDaniel v. Grace*, 15 Ark. 489.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HAIGHT *v.* JOYCE.

[2 CALIFORNIA, 64.]

NEGOTIABLE NOTES GIVEN FOR GAMING CONSIDERATION ARE VALID IN HANDS OF INNOCENT INDORSEES, to whom they are transferred before maturity, except when such notes are made void by express statute.

ACTION on two promissory notes against the defendants as executors of one Woodruff, the maker. The notes were both dated December 2, 1850, payable five days after date, and indorsed by the payee, Lippincott, to the plaintiff on December 3, 1850. The defendants proved that the notes were given partly for money loaned by Lippincott to Woodruff to be played with at cards, and partly for money won at cards by the former from the latter. The court rendered judgment for the plaintiff, and the defendants appealed.

Chetwood, Edwards, Rose, and Turk, for the appellants.

H. H. Haight, for the respondent.

By Court, MURRAY, J. The question presented for our consideration in this case is, whether payment of a negotiable note, in the hands of an innocent indorsee, can be avoided on the ground that it was given for money lost or won at play. It is contended by the appellants, that gaming contracts are void at common law, and that a note given for such consideration, being void between the original parties, is void in the hands of an innocent holder. The case of *Bryant v. Mead*, 1 Cal. 441, decided by this court, is relied upon as authority to sustain the position that these contracts were void by common law. That was a suit between

the original parties; and the fact that the money was lost at a public gaming-house, the amount and all the circumstances were taken into consideration. The correctness of that decision has since been doubted; and if the subject were now open for consideration, I should be inclined to question it. But granting these contracts were void at common law, let us inquire how far this principle affects the present case.

Although want or illegality of consideration may be inquired into in a suit upon a bill or note between the original parties, by the general mercantile law, where these securities have passed into the hands of third persons without notice, the maker is estopped from setting up such defense. This peculiar system of credit is favored by the law; and a rule requiring the indorsee of every bill or note to inquire into the consideration would retard commercial transactions, and, in the language of Lord Kenyon, "shake paper credit to its foundation." In the case of *Bowyer v. Bampton*, 2 Stra. 1155, it was held, that the innocent indorsee of a gaming note could not recover in an action against the drawer. This decision was based on the statute of 9 Anne, which declares such notes void to all intents and purposes whatever. It was considered that the words "all intents and purposes whatever" made the statute apply to notes in the hands of third persons; and it was said if the lender was allowed to indorse it, it would be making it of some use to him. This decision was subsequently questioned by the bar; and Lord Mansfield, in the case of *Peacock v. Rhodes*, 2 Doug. 636, said that it was well settled, "that the holder of a promissory note coming fairly by it has nothing to do with the original contract between the parties, except in the single case (which is a hard one, but which has been settled) of a note for money won at play." Although money contracts were void at common law for illegality, etc., of consideration, it is impossible to find a single case in which a note given for an illegal consideration has been held void in the hands of third persons, except by operation of statute. In the case of *Vallett v. Parker*, 6 Wend. 615, the court lay down the rule, that the want or illegality of consideration of a note transferred before due can not be shown, in an action by a *bona fide* holder, except where the note is declared void by statute.

It is contended by the appellants, that the rule must be the same, whether the note be void by statute or common law. In support of this proposition, *Bell v. Wood*, 1 Bay, 249, is cited. That was an action upon a note given for compounding a felony. That court say, that it makes no difference whether the note was

void by common law or made so by statute; but this may be considered as an *obiter dictum*, as the decision of the court does not rest upon that principle, but turns on the fact that the note was indorsed after it became due. The case of *Wiggin v. Bush*, 12 Johns. 306 [7 Am. Dec. 324], cited to sustain the same principle, turned upon a similar point; and the court remarked, that the statute evidently intended to make such notes void, in whose-soever hands they might come.

From the general tone of these decisions, as well as the policy of the commercial law, I am of opinion that these contracts can only be held void in the hands of third persons when made so by express statute. Any other decision would destroy confidence in commercial transactions, and open a wide door to fraud and perjury.

Judgment affirmed.

BOA FIDE HOLDER OF NEGOTIABLE PAPER, FOR VALUE, BEFORE MATURITY, PROTECTED: See *Petty v. Hannum*, 36 Am. Dec. 303, and prior cases in note; *Hascall v. Whitmore*, Id. 738; *Stalker v. McDonald*, 40 Id. 388; *Thompson v. Shepherd*, 46 Id. 676; *Myrick v. Hasey*, Id. 583; *Sweetser v. French*, 48 Id. 666; as to the rights of one who takes negotiable paper in payment of a pre-existing debt, see *Schaub v. Clark*, 47 Id. 554; *Blanchard v. Stevens*, 50 Id. 723, and prior cases in notes. An indorser after maturity takes the paper subject to what equities: *Annan v. Houck*, 45 Id. 133, and cases in notes; *Snyder v. Riley*, 47 Id. 452; *Comstock v. Draper*, 53 Id. 78. It was held in *Thorne v. Yontz*, 4 Cal. 323, following the principal case, that a promissory note, the consideration of which was against public policy, having been transferred to an innocent holder for value, before its maturity, was purged of the objection in his hands.

MULDROW v. NORRIS.

[2 CALIFORNIA, 74.]

AWARDS WILL BE SET ASIDE FOR FRAUD, MISTAKE, OR ACCIDENT, in equity, in the absence of statutes.

AWARD WILL BE SET ASIDE FOR MISTAKE OF LAW appearing on its face, in the reasons given by the arbitrators for their findings; although in case of a general finding, mistakes will not be inquired into by evidence *aliunde*.

DAMAGES FOR REMOTE AND SPECULATIVE LOSS OF PROFITS CAN NOT BE ALLOWED, and an award rendered upon such basis will be set aside.

JURISDICTION OF COURTS CAN NOT BE DIVESTED BY AGREEMENTS OF PARTIES, and where parties have stipulated not to appeal, courts of equity may interfere, in the absence of statutes, to correct fraud or mistake appearing on the face of the record.

AWARD MAY BE SET ASIDE ON MOTION, under the California system of practice, the judgment thereon being *in fieri* at the time of making the motion.

AWARD MAY BE SUSTAINED IN PART AND SET ASIDE IN PART, where portions of it only are bad for mistake, and the award is not attacked on the ground of fraud, and the subject-matter is in its nature divisible.

APPEAL from an order overruling a motion to set aside an award. The parties to the controversy, on February 14, 1851, executed certain articles submitting matters of difference, suits, etc., between them to three designated persons, whose award, or the award of two of them, was to be final and conclusive. The arbitrators were constituted jointly and severally attorneys in fact to confess judgment against the parties, or either of them, according to the award; and it was agreed that neither party should appeal from the judgment, sue out any writ of review, or prevent execution thereon. The submission and power of attorney were declared to be irrevocable, provided the award was made on or before April 1, 1851. Muldrow, at the March term, 1851, of the district court for Sacramento county, filed in the court the articles of submission, and at the same time filed the award of the arbitrators, made February 28, 1851. The award stated that under a lease executed by Norris to Muldrow, the latter might use, at his option, from one acre to one thousand acres of Norris' land; that Muldrow was desirous of cultivating two hundred acres of the same, but was prevented by Norris from using more than forty; that the produce of twenty acres of the land was worth nine thousand dollars, making that of two hundred acres, when cultivated, ninety thousand dollars; and that after deducting the amount that Norris would have received for the use of the one hundred and sixty acres, the expense of ditching and cultivating the same, and the amount due Norris for the use of the forty acres cultivated, a balance was due Muldrow of thirteen thousand five hundred dollars, which, with ten thousand dollars damages for Norris' violation of Muldrow's ferry privileges, and Norris' refusal to furnish Muldrow with the number of cows specified in the lease, was awarded to Muldrow. Certain other awards, as to the rights of the parties under the lease, costs, etc., were also made. A confession, authorizing the entry of judgment against Norris, was thereupon filed by one of the arbitrators, and judgment was entered against Norris, in accordance with the award, on motion of Muldrow. Objections against the entry of judgment, alleging mistake, bias, and corruption on the part of the arbitrators, and praying that the award be set aside, were filed the same day by Norris. The motion to set aside the award was overruled, and Norris excepted and appealed.

D. Stevens, for the appellant.

Thomas and Morse, for the respondent.

By Court, MURRAY, J. It is unnecessary, for the determination of this cause, to consider many of the points raised on the argument. The first point we propose to examine is as to the power of the court below to inquire into the award now before us. It is a well-settled principle that courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident, and it makes no difference whether the mistake be one of fact or law. It is true, under a general submission, arbitrators have power to decide upon the law and facts; and a mere mistake of law can not be taken advantage of. The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex æquo et bono*. If, however, they mean to decide according to the law, and mistake the law, the courts will set their award aside. A distinction seems to have been taken in the books between general and special awards. In the case of a general finding, it appears to be well settled that courts will not inquire into mistakes by evidence *aliunde*; but where the arbitrators have made any point a matter of judicial inquiry by spreading it upon the record, and they mistake the law in a palpable and material point, their award will be set aside: 2 Story's Eq. Jur. sec. 1453. The mere act of setting forth their reasons must be considered, for the purpose of enabling those dissatisfied to take advantage of them: *Kent v. Elstob*, 3 East, 13. In all cases where the arbitrators give the reasons of their finding, they are supposed to have intended to decide according to law, and to refer the point for the opinion of the court. In such cases, if they mistake the law, the award must be set aside; for it is not the opinion they intended to give, the same having been made through mistake: *Kleine v. Catara*, 2 Gall. 61. In the case already cited, the court say: "These special awards are not to be commended, as arbitrators may often decide with perfect equity between the parties, and not give good reasons for their decision; but when a special award is once before the court, it must stand or fall by its own intrinsic correctness, tested by legal principles." See also *Chase v. Westmore*, 13 East, 357; *Williams v. Craig*, 1 Dall. 313; Kyd on Awards, 351; 1 Steph. N. P. 75.

In the case before us, the arbitrators have set forth the particular grounds upon which their finding was based; and it fol-

lows, from the authorities already cited, that the correctness of the principles by which they must be supposed to have been governed is a proper subject for judicial inquiry.

The main error alleged as appearing on the face of the record is, that the arbitrators erred in estimating the amount of damages. The calculation is based upon the fact that the product of twenty acres of land was worth nine thousand dollars, from which the arbitrators infer the product of two hundred acres would have been worth ninety thousand dollars. The damages thus estimated are too remote and speculative, and involve too many contingencies: *Yonge v. P. M. S. S. Co.*, 1 Cal. 353, in this court; and *Sedgwick on Dam.* 98. The rule adopted by the arbitrators was clearly illegal, and an award rendered upon such a basis was unconscionable.

It was contended that this appeal should be dismissed, because the appellant stipulated in his submission bond not to appeal from the award of the arbitrators. The agreements of parties can not divest courts of law or equity of their proper jurisdiction. Notwithstanding the difference of opinion that may have existed as to the jurisdiction of courts of law and courts of equity on this subject, we are of opinion that a court of equity, in the absence of any statute, where the parties have stipulated not to appeal, may interfere to correct fraud or mistake appearing on the face of the record. Neither do we think the remedy resorted to by the appellant improper, under our peculiar system, where law and equity are blended together. The judgment was *in fieri* at the time the motion was made. The court below erred in not setting the judgment aside for mistake of law apparent on the face of the award.

The judgment of the court below must be reversed, and the appellee left to his remedy at law.

MURRAY, J. This case was decided at the present term, and the appellee now moves the court for a rehearing and modification of the judgment, on the ground that a court will not set aside portions of an award which are correct and made without mistake of law or fact. This principle is correct; and it is proper for courts to distinguish between those portions which are good and those which are not, where the award is not attacked on the ground of fraud, and the subject-matter is in its nature divisible. The judgment of this court was based on the refusal of the court below to set aside a judgment rendered on an award illegal upon its face; and we feel no disposition, after passing generally upon the decision of the court below, to open up our decision.

Whatever rights the appellee may have must be asserted in the court below.

Motion overruled, and rehearing denied.

AWARDS, WHEN SET ASIDE FOR MISTAKE: See *Pleasants v. Ross*, 1 Am. Dec. 449; *Ross v. Overton*, 2 Id. 552; *Blackledge v. Simpson*, Id. 614; *Alken v. Bolan*, Id. 660; *Heuitt v. State*, 14 Id. 259; *Jocelyn v. Donnel*, Id. 753, and note; *McCalmont v. Whitaker*, 23 Id. 102; *Smith v. Cutler*, 25 Id. 580; *Bumpass v. Webb*, 29 Id. 274; *Byars v. Thompson*, 37 Id. 680; *Rand's Adm'r v. Redington*, 38 Id. 475; *Johnson v. Noble*, Id. 485; *Pollard v. Lumpkin*, 52 Id. 128; and see *Chapline v. Overseers*, 30 Id. 504; *Knight v. Wilder*, 48 Id. 660. The principal case was explained and its language quoted in *Tyson v. Wells*, 2 Cal. 130, to the effect that the award of an arbitrator or report of a referee will not be disturbed, unless the error complained of, whether it be of law or fact, appears on the face of the award or report; so, also, in *Headley v. Reed*, Id. 325, the rule was said to be settled by the principal case, that "the decision of a referee can only be set aside on account of fraud or gross error of law or fact apparent upon its face." The principal case was further cited in *Peachy v. Ritchie*, 4 Id. 207, as reviewing the whole doctrine of arbitration, and deciding that the general finding of arbitrators will not be disturbed, and that an award could not be set aside, except in the cases there mentioned; and in *Carsley v. Lindsay*, 14 Id. 394, to the point that an award can not be impeached because contrary to law and evidence.

AWARD, WHEN SET ASIDE FOR CAUSES OTHER THAN MISTAKE: See *Alken v. Bolan*, 2 Am. Dec. 660; *Blackledge v. Simpson*, Id. 614; *Jocelyn v. Donnel*, 14 Id. 753, and note; *Smith v. Cutler*, 25 Id. 580; *Bumpass v. Webb*, 29 Id. 274; *Emerson v. Udall*, 37 Id. 604; *Rand's Adm'r v. Redington*, 38 Id. 475; *Butler v. Boyles*, 51 Id. 697; and see *Doolittle v. Malcom*, 31 Id. 671; *Elmendorf v. Harris*, 35 Id. 587, and note. See also the principal case cited in *Headley v. Reed*, 2 Cal. 325; *Peachy v. Ritchie*, 4 Id. 207, both considered *supra*; and in *Craft v. Thompson*, 51 N. H. 544, to the point that equity will interfere and set aside an award obtained by fraud or misbehavior of one of the parties.

MISTAKE, WHEN RELIEVED AGAINST IN EQUITY, IN GENERAL: See *Leavitt v. Palmer*, 51 Am. Dec. 333, and cases in note.

JURISDICTION OF COURTS NOT OUSTED BY AGREEMENT TO SUBMIT TO ARBITRATION: *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 289, and note, where the subject is considered.

MOTION TO VACATE OR MODIFY AWARD, WHEN SHOULD BE MADE: See *Smith v. Cutler*, 25 Am. Dec. 580.

AWARD GOOD IN PART AND BAD IN PART will be treated as void *in toto*, if the void part and the good part are so connected that justice might not be done by permitting the latter to have effect: *Philbrick v. Preble*, 36 Am. Dec. 718. The principal case was cited in *Williams v. Walton*, 9 Cal. 146, to the point that an award may be good in part and bad in part, or void *pro tanto* or *in toto*, and may therefore be enforced or not accordingly.

WHO MAY SUBMIT CLAIM TO ARBITRATION: See *Hutchins v. Johnson*, 30 Am. Dec. 622, and note considering the question.

EXTENT OF POWERS OF ARBITRATORS: See *Whitfield v. Whitfield*, 47 Am. Dec. 350, and cases in note; *Graham v. Graham*, 49 Id. 557.

DAMAGES FOR REMOTE AND SPECULATIVE LOSS OF PROFITS, WHETHER

ALLOWED: See *Blanchard v. Ely*, 34 Am. Dec. 250; *Masterton v. Mayor etc. of Brooklyn*, 42 Id. 38; *Davis v. Fish*, 48 Id. 387, and notes to the various cases.

ACTION BROUGHT ON AWARD AND AGREEMENT INVOLVED IN PRINCIPAL CASE will be found in *Muldrow v. Norris*, 12 Cal. 331.

THOMPSON v. MONROW.

[2 CALIFORNIA, 99.]

COMMON LAW IS PRESUMED TO BE RULE OF DECISION IN OTHER STATES, unless the contrary is expressly shown.

JUDGMENTS AT COMMON LAW CARRIED NO INTEREST.

INTEREST ON JUDGMENT OF ANOTHER STATE SHOULD NOT BE ALLOWED where there is no evidence showing that the common law of such state has been altered by statute.

ERROR IN JUDGMENT OF COURT BELOW WILL NOT BE PRESUMED by appellate court; it must be clearly disclosed.

ACTION on a judgment for one thousand six hundred and eighty-seven dollars and five cents, recovered by one Moore, against the defendant, in the court of common pleas of the county of New York, state of New York, and assigned to the plaintiff. The plaintiff had judgment, and pending this appeal by the defendant the transcript of the record was destroyed by fire. As a substitute for the record an agreement was filed by the parties, to the effect that the action was brought upon the judgment; that the only evidence on the trial was an exemplification of the record of the judgment, for the recovery of one thousand six hundred and eighty-seven dollars and five cents; and that judgment was thereupon rendered for the plaintiff for two thousand one hundred and eighty-five dollars and ten cents, and costs.

J. Clarke, for the appellant.

Chetwood, Edwards, Rose, and Turk, for the respondent.

By Court, HEYDENFELDT, J. According to the well-settled doctrine of several of the highest courts of other states, we must judicially know (presume?) that the common law is the rule of decision in the other states, unless the contrary is expressly shown. It follows that, as no judgments at common law carried interest, none should be here allowed on a judgment rendered in the state of New York, where there is no evidence showing that the common law had been altered by statute of that state.

But in the record of the case now under consideration it nowhere appears that the court below did allow interest upon the judgment. It is true that the judgment below is for a much larger sum than the New York judgment sued upon, but that may have resulted from the addition of the costs. We can not presume error unless it is clearly disclosed.

Let the judgment be affirmed.

The appellant filed a petition for a rehearing, which the court overruled.

COMMON LAW PRESUMED TO PREVAIL IN SISTER STATE: *Dunn v. Adams*, 35 Am. Dec. 42.

JUDGMENTS, WHETHER CARRY INTEREST: See *Collais v. McLeod*, 49 Am. Dec. 376, and cases in note; note to *Selleck v. French*, 6 Id. 197. The principal case was cited in *Cavender v. Guild*, 4 Cal. 253, to the point that the legal rate of interest in other states, or the fact that judgments of other states bear any rate of interest, are matters of fact to be proven, and can not be judicially noticed.

JUDGMENTS REVERSED FOR ERRORS ONLY WHEN APPARENT: *State v. Scott*, 42 Am. Dec. 148; *Bolles v. Beach*, 53 Id. 263; and the same is true where judgments are sought to be arrested: *State v. Creight*, 2 Id. 656; *State v. George*, 49 Id. 392.

BILLINGS v. BILLINGS.

[2 CALIFORNIA, 107.]

POWER GIVEN TO ASSIGNEES, FOR BENEFIT OF CREDITORS, TO SELL ON CREDIT, IS PRESUMPTIVE EVIDENCE OF FRAUDULENT INTENT—to hinder and delay creditors.

FRAUDULENT INTENT IS MADE QUESTION OF FACT in all cases arising under the California statute of frauds and fraudulent conveyances.

PRESUMPTION OF FRAUDULENT INTENT MAY BE FOUND AGAINST, and the verdict will not be interfered with, where the evidence of such intent is declared by law to be merely presumptive; but if certain *indicia* are declared to be conclusive evidence of fraud, a verdict against such evidence should in all cases be set aside.

ACTION by a receiver against assignees for the benefit of creditors, to test the validity of the assignments. Two partners, Simmons and Stowell, had executed to the defendants a joint assignment of the firm's real estate in California, and of all its personal property, for the benefit of creditors, giving the defendants power to sell the same at public auction or private sale, for such prices and on such terms, either for cash or on credit, as in their judgment was most advantageous to the parties concerned, and making certain preferences among the creditors.

Separate assignments of their individual property were also made to the defendants on the same day by Simmons & Stowell, containing similar powers and dispositions, after payment of their individual debts. Judgment was afterwards obtained against Stowell, as the surviving partner of the firm, upon which execution was issued and proceedings supplementary thereto had, and the plaintiff was appointed receiver of Stowell's property, as well partnership as individual, with directions to bring an action against the defendants. The present action was accordingly begun, the complaint alleging that the assignments were fraudulent and void, having been made to hinder, delay, and defeat creditors, and praying that the defendants be compelled to deliver the property to the plaintiff to be applied on the judgment. The cause was tried by the court, the parties having waived a jury, and the court found for the defendants, and gave judgment against the plaintiff for costs. There was no proof of intentional fraud. The plaintiff asked the court to decide that the assignments were void, because, among other reasons, a preference was given to creditors; the assignments included only the assignors' real estate in California, and not all their real estate; the assignees had the right to sell on credit; the creditors of the old firm, to which Simmons & Stowell succeeded, came in with those of the new; and future interest on debts not carrying interest was allowed; and also, that the intent was a matter of fact; but the definition of matter of fraud was left to the law.

McAllister, for the appellant.

A. C. Peasley, for the respondents.

By Court, HEYDENFELDT, J. In this case it was stipulated by counsel, in open court, that the court should decide upon the legal effect of the deed of assignment, aside from any peculiarity in the agreed case, which might prevent us from so doing.

The appellant insists that the deed of assignment bears upon its face certain *indicia* which are presumptive evidence of an "intent to delay, hinder, or defraud creditors." It is only in regard to one out of several of those pointed out by counsel that we assent to the proposition. The power given in the assignment to sell on credit is presumptive evidence of a fraudulent intent to hinder and delay, and for the reasons which the appellant's counsel have so well argued. Such a power conferred upon an assignee of the debtor's own selection may generally be presumed to lead to collusion for the benefit of the

debtor. It would certainly enable the assignees to delay the creditors indefinitely, by selling the property upon long credits; and it is no answer to this objection, as insisted by the respondents' counsel, that a court of equity could control him, because, first, if the power is a valid one, it must be valid to all intents; and being the act of the party entitled to confer it, the court could not interfere to take it away; and secondly, the property being once sold, the court could not take it away from the innocent purchaser, and the wrong would be irremediable. The case of *Barney v. Griffin*, 2 N. Y. 365, was a case precisely the same as the one under consideration; and although we are not prepared to go as far as the court there went, yet we can not but approve the reasoning of that decision.

Holding this opinion on the point just considered, the next question to be decided is, Does the record show any error which requires us to reverse the judgment? The twenty-third section of our statute of frauds declares: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, and not of law." And section 17 of article 6 of the constitution says: "Judges shall not charge juries with respect to matters of fact, but may state testimony, and deliver the law." In construing the section above quoted from the statute of frauds, we design to give it the full effect to which it is entitled; and therefore we decide that although the question of fraudulent intent is made a question of fact in all cases, yet wherever the law declares that certain *indicia* are conclusive evidence of fraud, a verdict against such conclusive evidence should in all cases be set aside. On the other hand, where the evidence of fraudulent intent is declared by law to be only presumptive, the jury have the power, upon considering the whole case, to find against such presumption; and the court would have no right, upon that ground alone, to interfere with the verdict. Such is the effect which we feel bound to give to the statute.

The counsel for the appellant argued this case upon the hypothesis that the district court refused to decide that the power to give credit was presumptive evidence of fraud. We can not discover this by anything which appears in the record; if we did, we would not hesitate to reverse the judgment. The requests to the court below are each accompanied by the same commencement, which asks the court to decide "that these assignments are void." Holding, as we do, that the power given to the assignees to sell on credit is not conclusive, but only pre-

sumptive evidence of fraud, it follows that the court correctly refused to decide that the deed was void on that ground; and the court having also, in the capacity of a jury, passed upon the facts, and found against the presumption of fraud, there is no error disclosed for our correction; and the judgment must therefore be affirmed.

FRAUDULENT INTENT, WHEN QUESTION OF FACT: See *Trotter v. Howard*, 9 Am. Dec. 640; *Jennings v. Carter*, 20 Id. 635; *Dinner v. McLaughlin*, Id. 655; *James v. Howard*, 41 Id. 525; *McVicker v. May*, 45 Id. 637; *Briscoe v. Brough*, 46 Id. 108; *Brann v. Fice*, Id. 519. The principal case was cited in *Palmer v. Palmer*, 6 Cal. 122, to the point that whenever there is no dispute as to the facts, and the law upon those facts declares a transaction to be fraudulent and void, it is not a question for the jury: the court, in such a case, may direct the jury how to find, or set aside the verdict if they find the contrary. The language of the principal case in reference to presumption of fraudulent intent was explained in *Smith v. Morse*, 2 Id. 541, 542, where it was held, that if the court could not set aside the verdict in the principal case where there was acknowledged presumptive evidence of fraud, because the presumption had been found against, it could not properly set aside a verdict in favor of the presumption. If the jury find a transaction fraudulent, without any evidence to support it, its finding will be reversed on appeal: *Dodd v. McCraw*, 46 Am. Dec. 301.

FRAUD, WHETHER MAY BE PROVED BY CIRCUMSTANTIAL OR PRESUMPTIVE EVIDENCE: See *Henderson v. Kelly*, 39 Am. Dec. 250; *McDaniel v. Baca*, post, p. 359; *Brice v. Brough*, 46 Id. 108; *White v. Trotter*, 53 Id. 112, and notes to the two latter cases.

PREFERENTIAL ASSIGNMENTS, WHETHER VALID: See *Denny v. Dana*, 48 Am. Dec. 655; *Arthur v. Commercial etc. Bank*, Id. 719, and prior decisions in notes to these cases; *Mahon v. Hall*, 52 Id. 688; *White v. Trotter*, 53 Id. 112.

ASSIGNMENT COVERING PORTION OF PROPERTY ONLY, WHETHER VALID: *Green v. Rep.*, 38 Am. Dec. 568; and as to the effect of a reservation for the benefit of the assignor himself, see *Pike v. Bacon*, 38 Id. 259, and prior cases in note; *Pettibone v. Stevens*, Id. 57.

SALMON v. HOFFMAN.

[2 CALIFORNIA, 138.]

VENUE OF REAL ESTATE IS PUT ON GUARD AS TO TITLE by a contract to convey to him lots "by the same title" by which a certain person "held them at the time of his death;" such language is as forcible as the legal maxim of *caveat emptor*; and it is sufficient, where he claims a defect in the title, that the conveyance placed him in actual possession of the premises.

REAL PARTY IN INTEREST BEING PLAINTIFF, an objection that the contract in question was made by him as agent for others will not be considered.

DEED INOPERATIVE AS CONVEYANCE IS GOOD AS CONTRACT TO CONVEY as against the principal, where it is improperly executed by an authorized agent in his own name.

VENDOR HAS LIEN ON LAND SOLD for the payment of the purchase money, even where the title has been fully conveyed, if he has taken no security for the payment; and the rights of a vendor who has not conveyed the title can not be of less efficacy.

VENDOR'S POSITION IS ANALOGOUS TO THAT OF MORTGAGEE, where he has not conveyed the title to the land sold.

VENDOR MAY INSIST ON PAYMENT OF OR SECURITY FOR PURCHASE MONEY on tendering a deed of the land sold, as a condition of delivering the deed.

RESCISSION OF CONTRACT CAN NOT BE SOUGHT IN EQUITY by a party whose own default caused the only obstacle to its completion, and the other party is entirely without blame.

ACTION by the grantee of certain lots, claiming that the defendants' title never passed by a deed which had been executed for the plaintiff's use, and that the consideration for the portion of the purchase money which had been paid had failed, and praying judgment for such money. A contract for the sale of the lots in question had been made between one Henry Fisher, attorney in fact of the defendants, who were the heirs of James Scott, and the plaintiff, by which the former was to convey to the latter, on the payment of a certain sum, "the said lots by the same title by which said James Scott held them at the time of his death." The deed of the premises, which was afterwards executed, and under which the plaintiff took and held possession, purported to be between "Henry Fisher, attorney in fact, etc., of the one part, and Mary Catharine Salmon, of the other part," and was signed "Henry Fisher, attorney in fact for the heirs of James Scott, deceased." It was alleged in the complaint, and admitted by the answer, that this deed to Mary Catharine Salmon, the plaintiff's sister, was for the use of the plaintiff. Subsequently to the execution of the foregoing deed, the plaintiff requested Fisher to procure the defendants to execute a conveyance of the lots to another person, which was accordingly done, and tendered to the plaintiff, on payment of or security for the balance of the purchase price, but the plaintiff failed or refused to pay the money. The defendants, in their answer, again offered to deliver a deed on payment of the purchase money, and set up a counter-claim for the balance due, with interest. It was further found by the court that the money paid by the plaintiff was furnished him by several other persons who were associated and interested with him in the purchase, and who had never assigned to him

their interest in such money. Judgment was rendered for the defendants, and the plaintiff appealed.

Saunders, Hepburn, and Bagley, for the appellant.

Hamilton and McLane, for the respondents.

By Court, HEYDENFELDT, J. The defendants were the heirs of James Scott; and in making the contract which has given rise to this suit, one Fisher was their agent. Fisher, as agent, contracted with the plaintiff to sell the lots in question "by the same title by which James Scott held them at the time of his death." This language is so specific as to have put the plaintiff on his guard; and is just as forcible as the legal maxim of *caveat emptor*. This renders it unnecessary to inquire into the title which was acquired by James Scott in his life-time. It is sufficient that the fact is found by the court below that the conveyance of such title placed the plaintiff into the actual possession of the premises.

The question raised, that the contract was made by the plaintiff as agent of Mary Catharine, or of other associates, amounts to nothing; because it is alleged in the complaint, and admitted by the answer, that, as far as Mary Catharine is concerned, her name was only used for some purpose which may have been proper and legitimate, and that the party really interested is the plaintiff. As far as regards any associates in the purchase which he may have had, the record discloses nothing which can warrant any conclusion for the court to act upon. The case must, therefore, be decided in the view that the plaintiff was the actual and sole purchaser of the lots described in the complaint.

The deed made by Fisher was improperly executed; but it bears on its face the evidence that this impropriety was the result of mistake or ignorance, and negatives the idea of an intention to defraud or deceive. He signs the deed with his own name, describing himself as "attorney of the heirs of James Scott." This was certainly irregular and informal. But it is found to be the fact that Fisher had an actual and *bona fide* power from the heirs of Scott to sell the lots; that in pursuance of that power he did sell; and, therefore, if the deed which he gave the plaintiff was inoperative as a deed, yet it was certainly sufficient to serve as "a note or memorandum in writing" of the agreement between the parties; and when to this is added that it was accompanied by the delivery of the possession, there was unquestionably sufficient evidence for a court of equity to have decreed a specific performance of the contract, and to have re-

quired the heirs of Scott to convey; or, if they were beyond the reach of the court, then to have made a decree divesting them of the title, and vesting it in the plaintiff.

The facts found, however, show that there was no necessity at any time to drive the plaintiff to his remedy for specific performance; if that were so, he might with equal right claim as his remedy the rescission of the contract. It seems that after the defective deed of Fisher was executed, the plaintiff requested him to have executed other deeds directly by the heirs of Scott, and to another person designated by the plaintiff. To this proposition a ready assent was given; and the respondents, in accordance with the directions of the plaintiff, executed the deeds, and tendered them to the plaintiff on the simple condition that he should pay the balance of the purchase money, which was then due, or secure its payment by a mortgage on the property, and this the plaintiff failed or refused to do.

It is a well-settled rule, that the vendor of real estate has an equitable lien on the land sold for the payment of the purchase money, even where the title has been fully conveyed, if he has taken no security for its payment; and the rights of a vendor who has not conveyed the title can not be of less efficacy. It is but a just precaution on his part, that he should withhold the title until the purchase money is fully paid; and the law will not deprive him of the only security which he has. His position is analogous to that of a mortgagee, and he may enforce his rights in the same manner.

It is unnecessary to decide anything as to the effect of the decision of this court in the case of *Fisher v. Salmon*, 1 Cal. 413 [54 Am. Dec. 297]. That case stood upon the facts then presented to the court, which were substantially different from those which have been eliminated in the case before us.

The plaintiff can not be permitted to come into a court of equity, and have relief by the rescission of the contract against the wishes of the respondents, when the only obstacle to its completion and fulfillment was caused by his own default, and when the other party is entirely without blame.

Let the judgment be affirmed.

VENDEE WITH NOTICE OF DEFECTIVE TITLE TAKES AT HIS OWN RISK: *Lighty v. Shorb*, 24 Am. Dec. 334; *Walker v. Quigg*, 31 Id. 452; *Rohr v. Kndt*, 39 Id. 53. The rule of *caveat emptor* applies to a purchase of real estate after the conveyance has been executed and received: *Cullum v. Branch Bank*, 37 Id. 725.

VENDEE IN POSSESSION, WHETHER CAN BE RELIEVED FROM PAYMENT OF

PURCHASE PRICE: See *Albott v. Allen*, 7 Am. Dec. 554; *Barkhamsted v. Case*, 13 Id. 92; *Giles v. Williams*, 37 Id. 692; *Gans v. Kenschaw*, 44 Id. 152; *Vick v. Percy*, 45 Id. 303, and notes to the various cases.

VENDEE IN POSSESSION IS ESTOPPED FROM DENYING VENDOR'S TITLE: *Larkin v. Bank of Montgomery*, 33 Am. Dec. 324; *Chumplin v. Dotson*, 53 Id. 102, and notes thereto; unless he first makes a *bona fide* surrender of the possession, and brings his action to try that title: *Greeno v. Munson*, 31 Id. 605. The principal case is cited in *Walker v. Sedgwick*, 8 Cal. 403, to the point that in an action to enforce a vendor's lien, neither of the parties could object for the purposes of the suit that the instrument executed was not a conveyance *in presenti*, where they both treated it as such, and possession was had under it.

VENDOR'S LIEN EXISTS WHETHER LAND CONVEYED OR NOT: See *Manly v. Slason*, 52 Am. Dec. 60, and note, where the prior cases are collected; *Conner v. Banks*, Id. 209. The principal case is cited in support of his lien, whether he has conveyed or simply contracted to convey, in *Cahoon v. Robinson*, 6 Cal. 226; *Hill v. Grigsby*, 32 Id. 59.

VENDOR'S POSITION, WHEN ANALOGOUS TO THAT OF MORTGAGEE. — A vendor's lien differs from an equitable mortgage in that the latter is founded upon an implied contract, while the former is not: *Wellborn v. Williams*, 52 Am. Dec. 427. The principal case was cited in *Willis v. Wozencraft*, 22 Cal. 617, to the point that the position of a vendor, where the purchaser is in possession under the contract, is analogous to that of a mortgagee; but in *Central Pacific R. R. v. Mudd*, 59 Id. 591, where the principal case was cited by counsel as authority for the proposition that a vendor had an equitable mortgage on the premises in possession of the vendee, it was said that it clearly appeared that the latter only held that the position of one having a vendor's lien was analogous to that of a mortgagee.

REAL PARTY IN INTEREST, WHEN TO SUE: See *Thompson v. Cartwright*, 46 Am. Dec. 95, and notes.

KILBURN v. RITCHIE.

[2 CALIFORNIA, 145.]

DECLARATIONS OF THIRD PERSONS ARE INADMISSIBLE IN EVIDENCE, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation exists.

ADMISSIBILITY OF DECLARATIONS OF THIRD PERSONS MUST BE ESTABLISHED by the party offering them, by showing the time and circumstances under which they were made; and if it does not appear in the record that this was done, it will be presumed that the court below properly refused to admit them.

JUDGMENT WILL NOT BE REVERSED FOR ERROR where the substantial rights of a party are not affected.

NOTICE TO QUIT IS UNNECESSARY where the relation of landlord and tenant does not exist.

IMPROVEMENTS CAN NOT BE SET OFF AGAINST DAMAGES FOR USE AND OCCUPATION where the defendant entered under a bond for a deed from the plaintiff.

ACTION to recover possession of certain land and three thousand dollars damages. The defendant claimed in his answer that the plaintiff and one Bale had bound themselves in March, 1847, to execute a quitclaim deed of the premises to one Barnett, who was then in possession, as soon as a government surveyor could be obtained to make a survey, and that Barnett was to remain in possession until the deed to him was made; that Barnett in April, 1849, conveyed his right by deed to one Kellogg, who took possession, and who made a conveyance, in April, 1850, to the defendant, under which the latter took possession; and that in 1848 suit was brought by Barnett against the plaintiff and Bale, to compel a conveyance according to the bond, and judgment was rendered in Barnett's favor. The answer further alleged that Bale was a necessary party, and that a surveyor had been appointed, and prayed that the plaintiff be decreed to convey to the defendant. On the trial of the cause by the court, the documents mentioned in the answer were introduced in evidence; and the plaintiff also introduced a deed of the premises made by Bale to the plaintiff in September, 1849. It appeared that owing to an objection to the competency of the alcalde a second trial of the suit mentioned in the answer had been held and a similar judgment given, which, however, was reversed on appeal and the cause remanded to the district court. The defendant proved possession, as stated in the answer, and improvements made by him to the value of two thousand dollars; but his offer to prove Bale's declarations that Barnett had complied with the bond, and was entitled to a deed, was rejected. It was decided by the court, among other things sufficiently appearing in the opinion, that a landlord's title can not be disputed by a tenant holding over, and as both parties claimed under Bale, the latter's title was not in question, and that Barnett was in possession under Bale, and until Barnett received a deed from the latter, Barnett's possession was the possession of the holder of the absolute title from Bale, who was the plaintiff. Judgment was given for the plaintiff for possession, eight hundred dollars damages, and costs, and the defendant appealed.

R. N. Morrison, for the appellant.

Botts and Emmett, for the respondent.

By Court, LYONS, C. J. The first question is, Did the court below properly refuse the evidence of Bale's declaration? It is

well settled that the declarations of third persons, not parties to the record, can not be admitted in evidence, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation, such as that of partners, exists. Wherever such declarations, which, *prima facie*, are inadmissible, are sought to be introduced, the party offering them must establish their admissibility by showing the time and circumstances under which they were made. The declarations of Bale, if made before the transfer to Kilburn, might have been admissible; but if made afterwards, could not be used as evidence against him. The time when these declarations were made nowhere appears in the record; and we are compelled to presume the court below properly refused to admit them.

It was not necessary for the plaintiff to set forth any transactions relating to the bond. He might have recovered upon proof of possession. The issue must be determined from the pleadings in the cause; and the finding of the court, sitting as a jury, is conclusive as to the facts. The court below seems to have mistaken the law, and treated the parties as if the relation of landlord and tenant existed. This does not, however, affect the substantial rights of the defendant. The parties could not be considered as landlord and tenant, and no notice to quit was necessary.

The court below properly refused to allow the value of the improvements as a set-off to the damages proved. A defendant entering into possession under a bond for a deed from the plaintiff can not be considered as holding adversely under color of title.

Judgment of the court below affirmed, with costs.

DECLARATION OF THIRD PERSONS, WHEN ADMISSIBLE.—When a part of the *res gestæ*: *Tenney v. Evans*, 40 Am. Dec. 194; *Stovall v. Farmers' and Mechanics' Bank*, 47 Id. 85; *White v. Morton*, 52 Id. 75; *Walter v. Gernant*, 53 Id. 491; when made by an agent: *Cunningham v. Cochran*, 52 Id. 230; *Mateer v. Brown*, Id. 303; *Moore v. Bettis*, 53 Id. 771; *Innis v. Steamer Senator*, 54 Id. 305; by a wife: *Casteel v. Casteel*, 44 Id. 763; *Jones v. McKee*, 45 Id. 661; by a former owner: *Padgett v. Lawrence*, 40 Id. 232; *Worrall v. Parmelee*, 49 Id. 350; *Masters v. Varner's Ex'rs*, 50 Id. 114; *Maxwell v. Harrison*, 52 Id. 385; *Settle v. Alison*, Id. 393; by a partner: *Dixon v. Hood*, 33 Id. 461; *Grafton Bank v. Moore*, Id. 478; by a joint tenant: *Darling v. Bryant*, 52 Id. 162; by a conspirator or person engaged in a fraudulent transaction: *Stovall v. Farmers' and Mechanics' Bank*, 47 Id. 85; by a principal against his surety: *Stephens v. Crawford*, 44 Id. 680; by the drawer of a bill: *Whiteford v. Burckmyer*, 39 Id. 640; by a father: *Lyon v. Bolling*, 48 Id. 122; and see the notes to the preceding cases.

JUDGMENT NOT REVERSED FOR ERROR NOT PREJUDICIAL: *Johnson v. Evans*, 50 Am. Dec. 668, and note; *Kohn v. Schooner Renaissance*, 52 Id. 577; *McPherson v. McPherson*, 53 Id. 416.

NOTICE TO QUIT, WHEN NECESSARY: See *Stedman v. McIntosh*, 42 Am. Dec. 122, and note considering the question; *Meraman's Heirs v. Caldwell's Heirs*, 46 Id. 537. The principal case is cited in *Dodge v. Walley*, 22 Cal. 229, to the point that where a person conveys property by a warranty deed, and remains in possession, he is not entitled to notice to quit and demand of possession before the commencement of an action to eject him.

VENDEE'S RIGHT TO COMPENSATION FOR IMPROVEMENTS: See *Richardson v. McKinson*, 12 Am. Dec. 308, and note considering the question; *Griffith v. Depew*, 13 Id. 141; *Shreve v. Grimes*, 14 Id. 117; *Ewing v. Handley*, Id. 140; *McCampbell v. McCampbell*, 15 Id. 48; *French v. Seely*, 32 Id. 758; *Herring v. Pollard's Ex'rs*, 40 Id. 653; *Martin v. Atkinson*, 50 Id. 403.

PRINCIPAL CASE IS ALSO CITED IN *Morgan v. Hugg*, 5 Cal. 410, as holding the general doctrine that error relied on must be clearly and affirmatively shown.

BELT v. MEHEN.

[2 CALIFORNIA, 159.]

MISTAKE WILL NOT BE CORRECTED IN EQUITY where the parties to an instrument have equal knowledge, or equal means of obtaining knowledge, of the mistake, and there has been no concealment, surprise, or imposition.

MISTAKE WILL NOT BE CORRECTED IN EQUITY where it arises from the laches of the plaintiff and the ignorance of the defendant; the means of information being equally open to both parties.

SUIT to correct articles of agreement dissolving a partnership, alleging fraud and mistake. The opinion states the facts.

J. K. Irving, for the appellant.

Thomas and Morse, for the respondent.

By Court, MURRAY, C. J. Previously to the commencement of this action, the plaintiff and defendant, who had been partners in mercantile business, by articles of agreement, dissolved the partnership, adjusted the debts, and distributed the assets of the firm. After the dissolution, the plaintiff brought his action in the court below to recover the sum of five thousand two hundred and seventy-three dollars and fifty cents, which sum he alleged had been fraudulently and falsely entered in the books of the firm to the credit of the defendant, and charged to the plaintiff, and was allowed by him through ignorance and mistake in the settlement of the partnership accounts. The court below, sitting as a jury, found the fact of mistake, but

that there was no evidence of fraud; and rendered a judgment for the defendant.

It appears from the opinion of the court, as well as from the testimony, that the defendant was an illiterate man, unable to write, and that all the entries were consequently made by his clerk. The books were kept in an irregular manner, and the plaintiff, who was a good business man, had access to and was in the habit of inspecting them. Mistake or ignorance of fact is said to be the proper subject for relief when the fact "constitutes a material ingredient in the contract of the parties, and disappoints their intention by mutual error, or where it is inconsistent with good faith. But where each party is innocent, and there is no concealment of facts which the other party ought or has a right to know, and no surprise or imposition exists, the mistake, whether mutual or unilateral, is treated as laying no foundation for equitable interference, and is strictly *damnum absque injuria*." It does not appear from the record upon what particular basis the partnership was dissolved and the assets distributed; so that we are left to speculate whether this particular item entered into the contract as a material inducement. For aught that appears, it may have been known and acted upon. It is likewise a principle, that where the fact and the source of information are equally open to both, each party is bound to avail himself of such information; and where the fact is unknown to both, and the parties have had equal means of information, if they have acted in good faith, equity will not interfere. It does not appear that the defendant knew of the entry. In fact, the judgment of the court finding there was no fraud negatives any presumption of such knowledge or concealment of it upon his part. The mistake, if it was material, might have been corrected by a reference to the books; and it would not be unfair, from the relation of the parties, to presume that it was immaterial or known to the plaintiff. We are of opinion there is not sufficient cause shown for reviving this claim, and disturbing the written agreement of the parties, as the mistake doubtless arose from the ignorance of the defendant and the laches of the plaintiff.

Judgment affirmed, with costs.

MISTAKE, WHEN RELIEVED AGAINST IN EQUITY.—In general, see *Chamberlain v. Thompson*, 26 Am. Dec. 390, and prior cases in note; *Brown v. Bonner*, 31 Id. 637; *Champlin v. Laytin*, Id. 382; *Moore v. Vick*, 32 Id. 301; *Beardsley v. Knight*, 33 Id. 193; *Newcomer v. Kline*, 37 Id. 74; *Willis v. Henderson*, 38 Id. 120; *McNaughten v. Partridge*, Id. 731; *Evants v. Strode's*

Adm'r, Id. 744; *White v. Wilson*, 39 Id. 437; *Jenks v. Fritz*, 42 Id. 227; *Osborn v. Phelps*, 48 Id. 133; *Leavitt v. Palmer*, 51 Id. 333. As to whether a mistake of law, made with full knowledge of the facts, and unmixed with fraud, surprise, etc., will be relieved against, see *Storrs v. Barker*, 10 Id. 316, and note; *Lawrence v. Beaubien*, 23 Id. 155, and note; *Good v. Herr*, 42 Id. 236; *Trigg v. Read*, Id. 447, and note. In *McCobb v. Richardson*, 41 Id. 374, it was held that equity would not relieve a vendee against mistake where equal information touching the nature and condition of the land sold was possessed by both parties, and the vendor acted with entire good faith; and in *Juzan v. Toulmin*, 44 Id. 448, it was held that whether a contract was entered into under mistake of law or fact was immaterial, where it was clear that it was made in good faith, each party possessing equal information, or at least equal means of acquiring knowledge, and neither having practiced towards the other any unfairness or deception.

PEOPLE v. CRAYCROFT.

[2 CALIFORNIA, 243.]

STATUTORY REMEDY MUST BE PURSUED where both the right and the remedy are given by statute; although if the right existed at common law, and a remedy is given by statute, the latter is regarded as cumulative, and either remedy might be pursued.

ACTION OF DEBT WILL NOT LIE TO RECOVER AMOUNT OF LICENSE for the keeping of a gaming-table, where the license act does not provide for such action. The statute must be strictly followed, and the only remedy is by indictment.

ACTION by a district attorney against the defendant, a keeper of gaming-tables, alleging that the latter had not made application for a license therefor, and seeking to recover of him the amount due. The defendant demurred to the complaint, and from the order overruling the demurrer he appealed.

S. J. Field, for the appellant.

S. C. Hastings, attorney general, for the respondents.

By Court, MURRAY, C. J. The only question in this case necessary for our examination is, whether the state can maintain an action of debt, under the act to license gaming, passed March 14, 1851, against persons keeping gaming-houses without having procured a license as provided by the act. The act referred to makes the keeping a gaming-table without a license a misdemeanor; and the party, on conviction, punishable by a fine of not less than one hundred dollars, nor more than one thousand dollars, or imprisonment in the county jail for not less than three nor more than six months. There is no other penalty provided; nor any provision in the statute authorizing a civil

action to recover the amount of the license. Where a right is given and a remedy provided by statute, the remedy so provided must be pursued. It is true, if the right existed at common law, the plaintiff might pursue either remedy, the statutory one being regarded merely as cumulative. Here a new and independent obligation has been created; and the statute must be strictly followed. An action of debt will not lie against the defendant, as upon a penal statute. The penalty is not certain; and the law has made no provision for the mode of prosecuting such an action. The only remedy is by indictment.

Judgment reversed.

STATUTORY REMEDY, WHEN CUMULATIVE.—Remedies are cumulative where a statute gives a remedy with a penalty, and a previous common-law remedy exists: *Dygert v. Schenck*, 35 Am. Dec. 575; and see *Aldrich v. Cheshire R. R.*, 53 Id. 212, and note, as to when a party is confined to his statutory remedy for damages occasioned by the doing of authorized acts. The principal case was followed in *People v. Raynes*, 3 Cal. 367, in holding that an action can not be maintained against the keeper of a gaming-house to recover the amount required by law for a license, which he had neglected to obtain; and in *Ward v. Severance*, 7 Id. 129, where an action was brought by the owner of a ferry against the defendants for running a ferry-boat within a certain distance of the former without a license, as prescribed by statute; the court holding in the latter case that where a new right is introduced by statute, the party complaining of its violation is confined to the statutory remedy, but if the right existed at common law, the remedy provided by statute was merely cumulative. The principal case was cited in *State v. Poulterer*, 16 Id. 526, as being a strong case in favor of the proposition that an action of debt would not lie against an auctioneer under the revenue act for the duty imposed thereby; but it was held that this authority, with others, was not inconsistent with the principle, that when a statute casts upon a party an obligation to pay money to particular persons, without providing a remedy for its recovery, an action of debt will lie.

BENEDICT v. BRAY.

[2 CALIFORNIA, 251.]

ATTACHMENT CAN NOT BE ISSUED NOR BOND TAKEN by a justice who has no jurisdiction of the amount claimed, and an action can not be maintained on the bond for injuries sustained by the attachment.

ATTACHMENT BOND IS VOID IF TAKEN AFTER DISMISSAL OF ATTACHMENT; it is the antecedent of the attachment and accompanies the affidavit, which must be made before the writ is issued.

ACTION ON ATTACHMENT BOND CAN NOT BE MAINTAINED where the levy was disregarded from the first, and no evidence exists that the mere fact of the levy caused actual injury.

CAUSES OF ACTION SET FORTH IN COMPLAINT CAN BE RECOVERED UPON ONLY; and concurrent and intimate causes of action can not as a matter of course be given in evidence, nor made the basis of a verdict, under the act which declares that "there shall be but one form of civil action."

ACTION, alleging that the defendants, well knowing that the plaintiff was not indebted to them, but intending to injure him, had brought suit against him before a justice, claiming an indebtedness of one thousand dollars; and had procured a writ of attachment to be issued against his goods and chattels, whereby he was greatly injured in his credit and lost the use and benefit of the chattels so seized; and further, that at the time of suing out the writ the defendants executed a bond to the plaintiff to prosecute the action, and if they failed to do so they would forfeit the sum of two thousand dollars; but that the suit had been discontinued, and by reason of the premises the plaintiff had been greatly injured and suffered damage to the extent of two thousand dollars, the amount of the bond, for which sum judgment was prayed against the defendants. The answer averred the defendants' belief of the plaintiff's indebtedness to them for killing their stock at the time of suing out the attachment, and denied that any damage was suffered by the plaintiff. A motion was made to dismiss the action, on the ground that the complaint did not state a cause of action, and that the bond was void, it being admitted that the bond was executed August 27, 1851, after the attachment had issued; but the motion was overruled. It appeared on the trial that the attachment was issued August 23d, delivered to the constable on Sunday, August 24th, and on the following day the attachment was dismissed by the defendants, the plaintiffs in the action. The levy was made on the Sunday by seizing the house and stock of the plaintiff, the defendant in the action, he being a butcher; and on the same day the plaintiff was arrested for grand larceny by the same officer, and taken before the same justice, to whom he gave his property in place of bail. The man placed in possession was informed by the justice on the following Wednesday that the attachment was dismissed, but the property was held until the ensuing Sunday as security for the plaintiff's appearance to answer the criminal charge. The bond in question bound the obligors to the plaintiff in the sum of two thousand dollars "to prosecute the suit now begun, etc., to its legal termination," or, "on failure of said prosecution, to pay said Benedict all damages resulting from suing out and levying an attachment on the goods and chattels in the above-

mentioned suit." The plaintiff had a verdict for the damages claimed, judgment was rendered accordingly, and a motion for a new trial was overruled.

E. J. C. Kewen, for the appellants.

Janes, Noyes, and Barber, for the respondent.

By Court, ANDERSON, J. (after stating the facts). The magistrate had no jurisdiction to the extent of the debt claimed, which was one thousand dollars. He had no authority to issue the attachment, nor to take the bond upon which the suit is brought; and that bond was taken after the dismissal of the attachment by the appellants.

The respondent exercised full authority over his property, which had been levied on under the attachment; and that on the day of the levy. He disposed of it for his convenience and legal relief, and it was so received by the magistrate; and the appellants do not appear to have held any control over it whatever. However much the respondent may have been injured in point of feeling, there does not appear to have been any legal ground upon which to rest this particular action; and no jury can be permitted to pass so entirely beyond the record as to put their finding at total variance with the declaration. That rested exclusively upon the bond, and no other cause of action is assigned. The verdict evidently looks to injuries which were no further connected with the attachment than as being concurrent in point of time; and whether the appellants, or others, were the parties liable for such other damages for a different cause, it is certain that they were under no legal liability on this bond. It was inoperative and could by no rule of law be made to take a retroactive application under the circumstances.

The bond is the antecedent of the attachment, and accompanies in point of time the affidavit which must be made before the writ is issued. It depends for its legal effect upon the writ. If no writ were issued, such a bond would be null and void. It could have no effect except as connected with the attachment. They exist together. The relations which the statute has established between the affidavit, the attachment, and the bond will be found fully stated in the last volume of the statutes, pp. 68, 69, secs. 121, 122.

The justice in this case had no authority to issue an attachment, or to take such a bond founded upon it. He was, under our statutes, totally without jurisdiction, *ratione materiæ*. A

bond exacted by an officer when he has no authority to require it is void: *Thompson v. Lockwood*, 15 Johns. 256. There are other authorities to the same point.

However, the attachment and levy had been vacated by the joint act of the respondent, the justice, and the sheriff. It is obvious that the levy was disregarded from the first, and the act of vacation was on the same day, and within a few hours of the levy. This fraction of time, in the absence of actual damages, under the circumstances, even if all the proceedings had emanated from an officer having competent jurisdiction, and the respondent, the court, and the sheriff had treated the process in like manner, as in this case, would have been fatal to any legal claim for recovery against the appellants. *A fortiori*, where there was no authority, the reason for this would be much stronger.

The cause of injury must proceed out of the attachment. Where, however, that was made by the particular parties mentioned (the respondent being the chief actor) inoperative, and no evidence existing that the mere fact of the levy had caused actual injury, the bond having been taken without authority, and no attachment upon which to rest, nor any of its effects and consequences to relieve against, was void *ab initio*, and it would be in the face of all legal precedent and sound policy for this court to give its sanction to a judgment founded upon such an attachment and such a bond.

Our statute has prescribed who may issue an attachment, and take the proper bond, and under what circumstances. This must be respected. The court can not change the law. We can only administer it. Every officer is presumed to know his duty. If he does not, and transcends his powers, the responsibility would rest with him; and the case would have to be peculiar, and coming within such other legal considerations as would justify this court, before it would hold a suitor subject to share the consequences proceeding from the wrong doing of a magistrate without authority.

Upon the trial of this case the bond was not legal evidence, for the plain reason that it was void; and the court ought to have so ruled. Upon the face of the record it is apparent that the court below ought to have dismissed the suit, and saved the party from any unnecessary accumulation of costs. The court erred in not granting the motion to dismiss.

There was also a motion for a new trial. This was refused. It ought to have been granted. It is not the province of this

court to point out the particular proceedings which ought to have been adopted. It is enough that there is no wrong for which there may not be ample redress. But we can not pervert legal remedies. This would be a species of judicial legislation. It is a mistake to suppose that, because the statute of 1851 sets out with declaring that there shall be but one form of civil action, that therefore when a party declares upon a certain cause of injury for redress, that other causes which were concurrent and intimate with it may, as a matter of course, either be given in evidence or made the basis of the verdict. Justice requires that parties should be confined to that to which they are entitled within their pleadings. In this case, according to the averments in the complaint, there was no legal ground upon which to rest a verdict. It is true that it was in evidence that the respondent had suffered injury, at the same time, from the prosecution of a charge of felony, of which he was acquitted; and if this was done upon proper proof, it gave to it force and authority in a different direction; but there was no legal rule by which it should have been allowed to connect itself with and control the case made under the declaration. Exactly the contrary.

Our decision is, that the judgment of the court below be reversed; and it is ordered that the case be dismissed, with costs to the respondent.

BONDS TAKEN WITHOUT AUTHORITY ARE VOID. A recognizance of special bail, taken by a sheriff out of his county, is extra-official and void: *Harris v. Simpson*, 14 Am. Dec. 101; and see the note to this case on bail bonds taken without authority. A bond taken *colore officii* by a sheriff, for the performance of conditions unauthorized by statute, is void: *Smith v. Allen*, 21 Id. 33. See also *Claasen v. Shaw*, 30 Id. 338. The principal case is quoted with approval in *Caffrey v. Dudgeon*, 38 Ind. 516, to the point that a justice of the peace can not approve a bond in replevin for property, the value of which exceeds his jurisdiction—the bond is void, and no action can be maintained thereon; it was cited in *Butler v. Wadley*, 15 Id. 507, among others, to the point that bonds given where unauthorized by law, or to obtain the issuing of a writ in a case where the court had no jurisdiction, are void, but distinguished in that the bond given in the case at bar was executed in a cause of which the court had jurisdiction; and in *People v. Slocum*, 1 Idaho, O. S., 71, while its doctrine was approved, it was held that the case bore little analogy to one where an official gave a bond, but of less stringency than that required by law, and sought exemption from liability under it on this ground.

HUTCHINSON v. WETMORE.

[2 CALIFORNIA, 310.]

ACTION FOR SERVICES ACTUALLY PERFORMED CAN NOT BE MAINTAINED by one who voluntarily abandons the work before its completion, where he has agreed to labor for a certain period at such a price, or to perform certain services for such an amount.

CONTRACT IS ENTIRE, AND VALUE OF PART OF SERVICES PERFORMED CAN NOT BE RECOVERED by an employee who abandons the contract before its expiration without the employer's fault, where the employee agreed to labor for eight months, at a certain rate per month for himself and for his wife, the employer to give his note at the end of four months, payable at the expiration of the term of service, and until which time the wages of the last four months were not to be paid.

ACTION to recover the value of services rendered. The facts appear in the opinion.

Curry, for the appellant.

Hastings, for the respondent.

By Court, MURRAY, C. J. This was an action of *indebitatus assumpsit*, brought by the plaintiff to recover the value of the services of himself and wife, for four months' labor upon and about the farm of the defendant.

The bill of exceptions shows that the plaintiff agreed to labor for eight months at the rate of one hundred dollars a month for himself, and one hundred dollars for his wife; that at the expiration of four months he abandoned his contract, without any fault of the defendant; that by the agreement the defendant was to give the plaintiff his note at the end of four months, payable at the expiration of his term of service; and that the wages for the last four months were not to be paid until the expiration of eight months from the commencement of his contract.

The court below sitting as a jury found that the plaintiff had engaged to work for eight months, and gave a judgment for the plaintiff for four months' services, deducting two hundred dollars damages sustained by reason of his leaving the employment of the defendant; from which the defendant appealed.

The only question for our determination in this case is, whether the contract was an entirety or not. The rule is well settled, that where a person agrees to work for a certain period at such a price, or to perform certain services for such an amount, he can not break off at his own pleasure, and maintain an action for the work as far as he has gone. "A strict performance is a

condition precedent, and unless the servant performs it to the utmost of his capacity, he can recover nothing, but is liable himself for a breach of the contract:" *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299].

It is true, where the contract is not entire, when by the terms of the contract payment may be demanded for part performance, an action lies for money due for such part performance.

Where M. agreed to work for R. for eight months for one hundred and four dollars, or thirteen dollars per month, and worked two months and left, refusing to work any longer, it was held that the contract was entire for eight months at a stipulated price, and that there was no modification or rescission of it; that M. had no claim until the expiration of the eight months, and the work was a condition precedent to payment: *Reab v. Moor*, 19 Johns. 337.

In the present case, it appears that the duration of the services was an important consideration with the defendant in entering into the contract; and that he had endeavored to protect himself from desertion, or a violation of the agreement, by reserving the payment until the expiration of the eight months. For aught this court knows, the wages stipulated may have been more, in consequence of the term, or the services of the plaintiff only valuable in view of the whole time. It certainly does appear, from the finding of the court, the defendant was put to inconvenience and damage by the breach of the contract. We are of the opinion that the contract was entire for eight months' labor, and that no action will lie to recover the value of part of the services performed. If the record showed any plausible reason for the plaintiff's breach, we would feel a reluctance in reversing the judgment of the court below, in view of the nature of the services; but to sustain this action, as it now stands, would be a violation of law, and serve to encourage an infraction of contracts for frivolous causes, or without any reason whatever.

Judgment reversed and new trial ordered.

VALUE OF SERVICES PART PERFORMED, WHEN RECOVERABLE: See *McKinney v. Springer*, 54 Am. Dec. 470; *Clark v. Mayor etc. of New York*, 53 Id. 379, and notes collecting the prior cases. The principal case was cited in *Isaacs v. McAndrew*, 1 Mont. 451, to the point, that where a contract for labor is for a time certain, at a fixed price per day, month, or year, and the servant leaves before the expiration of the stipulated time, the latter has no claim on the contract for the services rendered.

CONTRACT, WHEN ENTIRE: See *Ladd v. King*, 51 Am. Dec. 624, and note

collecting prior cases. The principal case was cited in *Stein v. Steamboat Prairie Rose*, 17 Ohio St. 476, to the point, that the insertion of a *per diem* rate, when the contract was for a reasonable time, did not divide the contract and warrant a suit at the end of the day.

McDANIEL v. BACA.

[2 CALIFORNIA, 326.]

WITNESS MAY BE IMPEACHED BY EVIDENCE THAT DIFFERENT STATEMENT WAS MADE BY HIM to others from that he made upon oath, where he acted as interpreter and attorney for the grantor and defendant, in executing a deed, and testified for the plaintiff, from whom he received a subsequent deed for part of the land, in an action involving the amount of land conveyed, in regard to his reading over the deed to the grantor, and to the grantor's admission of the quantity of land he had agreed to convey.

INSTRUCTION THAT MALICE IS PRESUMED WHERE ONE INJURIOUSLY SLANDERS ANOTHER'S TITLE is erroneous, and well calculated to mislead a jury.

FRAUD MAY BE INFERRED FROM STRONG PRESUMPTIVE CIRCUMSTANCES, and express proof is not required; and an instruction that fraud can not be presumed, but must be established by proof, and may be established by circumstances of conclusive but not of light character, is therefore erroneous.

MALICE DOES NOT ACCOMPANY PUBLICATION OF CAUTION AS TO TITLE made by a grantor of land, when the circumstances warranted a strong presumption that fraud had been attempted upon him to get possession of his estate.

FRAUD IN OBTAINING RECEIPT OF SUM AS SPECIFIED IN DEED IS DEFENSE to an action for slander of title against the grantor of land, who published a caution against persons purchasing from his grantee, claiming that the title was obtained under fraudulent pretenses.

VERDICT MAY BE SET ASIDE WHEN DAMAGES ARE UNEXAMPLED AND UNJUSTIFIABLE.

ACTION for slander of title to land, consisting in the publication of the following: "Caution.—I hereby notify all persons not to purchase any lands from William McDaniel, which he claims to have purchased from me, under a title which he obtained under false pretenses; and I shall institute suit against him to annul the title so fraudulently obtained by him. Manuel Baca." The answer set up covin, deceit, and fraud in the deed from Baca to McDaniel, and alleged that the latter had a deed prepared and read to the former, who did not understand English, as a deed for one square mile of land, instead of what it purported to be, for nine square miles. Further facts appear in the opinion.

Jones, Tompkins, and Stroud, for the appellant.

H. Lee and W. Smith, for the respondent.

By Court, ANDERSON, J. This is an action brought in the district court for the county of Solano, by William McDaniel, the present respondent, against Manuel Baca, the appellant, for slander of title to land.

The cause was tried on the thirty-first of October, 1851, by a jury in the court below. They rendered a verdict for the plaintiff of sixteen thousand seven hundred and fifty dollars.

The court ordered judgment to be entered therefor, and for the further sums of three hundred and sixty-five dollars, and five hundred and ninety-six dollars and fifty cents costs, making in all the sum of seventeen thousand seven hundred and eleven dollars and fifty cents. From this judgment the defendant appealed.

The facts are briefly, as appears by the record, that McDaniel purchased a tract of land from Baca, and obtained a conveyance from him. The deed was dated the twenty-first day of August, 1850, and is stated in the record to have been for a square English league of land. The defendant for answer states that said deed was obtained from him by covin, deceit, and fraud.

The slander of title consisted in the publication in a newspaper, under the signature of Manuel Baca, notifying all persons not to purchase any land from William McDaniel, which he claims to have purchased from him, but was under a title obtained by false pretenses; and that he should institute suit against said McDaniel to annul the title. The deed set forth that three thousand dollars were received by Baca as the consideration. One of the plaintiff's witnesses, who acted as interpreter and attorney for Baca, states that he read the deed to Baca. The deed was made on the twenty-first of August, and it appears that the same witness received a conveyance from McDaniel on the twenty-second of August, for an undivided half of the land. In relation to the same witness William Graham was called, on the part of the defendant, to prove that he had made to him and others a different statement from that which he did upon oath, in regard to the admission of Baca as to the quantity of land which he had agreed to convey. This testimony was objected to by the counsel for the plaintiff, and the court ruled that it could not be received. This was an error, and of a material and capital character; especially con-

sidering the peculiar history of the whole case, and the connection it had with the testimony of William Palmer, who swore that the plaintiff told him shortly before August, 1850, that he had bought of the defendant one square mile of land, and offered him land if he would help him to get the title papers of the defendant, which he refused to do.

The court, at the instance of the counsel for the plaintiff, instructed the jury "that where a person injuriously slanders the title of another, malice is presumed." Also, "that fraud can not be presumed, but must be established by proof, and may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature." These instructions were erroneous, and were well calculated to mislead the jury. They are contrary to law; and the record is contradictory and involved. Where fraud is charged, express proof is not required, it may be inferred from strong presumptive circumstances: *Greenl. Ev.*, sec. 428; *1 Story's Eq. Jur.*, sec. 190. The caution published by Baca has no marks of malice accompanying it. On the contrary, it was just such a notice as every freeman and freeholder in the land would be justified in making, if the circumstances warranted a strong presumption that any fraud had been attempted upon him to get possession of his estate.

The publication was made, founded upon his own title and a fixed belief that he had been defrauded. The proof is by the plaintiff's chief witness, and who, it seems, was the active agent in obtaining the conveyance; that he did not understand the English language, and he was certainly an easy subject over whom to obtain a mastery by skillful strategy.

The court below refused to instruct the jury, that if the receipt as specified in the deed for three thousand dollars was obtained by fraud, they were authorized to find for defendant. In this the court erred. There is not a case to be found in the history of jurisprudence which would sustain that ruling. It covered a question which entered materially into the trial. It belongs to a class of principles about which there has never been but one opinion, but one set of decisions. The citation of authorities would be superfluous.

The damages in this case were unexampled and unjustifiable; and although courts will not often disturb a verdict for that cause, yet they sometimes do, and particularly if it verges upon the line of an outrage. However, the court does not feel called upon to notice it in this instance. But by this we do not mean

to intimate that we should refuse for that cause, under any circumstances, to disturb that verdict, if it were necessary to the end of justice. It is sufficient to say, that the facts in this case are of a novel and extraordinary character; and it is desirable for the sake of justice that they should receive a full, fair, and impartial investigation. It is time in California to begin in this respect a new era, and this court is never better employed than when, by its decisions, it is pointing public attention, the public confidence, and the public judgment to that end.

It is the duty of this court to decide that the rulings of the court below, as adverted to, are erroneous, and that the verdict is contrary to law and evidence.

The decision of the court is, that the judgment of the court below be reversed, and the cause be remanded for a new trial; and that William McDaniel, the respondent in the case, pay the costs.

IMPEACHING WITNESS BY EVIDENCE OF CONTRADICTORY STATEMENTS, WHEN POSSIBLE: See *Tucker v. Welsh*, 9 Am. Dec. 137; *Fries v. Brugler*, 21 Id. 52; *Doe ex dem. Sutton v. Reagan*, 33 Id. 466; *Franklin Bank v. Pa. D. & M. Steam Nav. Co.*, Id. 687; *Sharp v. Emmet*, 34 Id. 554; *Munson v. Hastings*, 36 Id. 345; *State v. Marler*, Id. 398; *State v. Patterson*, 38 Id. 699; *McIntire v. Young*, 39 Id. 413; *Whiteford v. Burckmyer*, Id. 640; *Sealy v. State*, 44 Id. 641; *Moore v. Bettis*, 53 Id. 771.

FRAUD INFERRED FROM CIRCUMSTANCES: See *Billings v. Billings*, ante, p. 319, and cases in note thereto. The principal case was cited in *Tognini v. Kyle*, 15 Nev. 468, to the point that where fraud is charged, express proof is not required, but it may be inferred from strong presumptive evidence.

MALICE NECESSARY TO BE PROVED IN ACTION FOR SLANDER OF TITLE; but one who has reasonable grounds to suppose himself possessed of the legal title to lands, or of an equity therein which would enable him to maintain an action for a conveyance, is not liable in damages in such an action: *Walden v. Peters*, 38 Am. Dec. 213. The action can not be maintained for verbal slander against two persons jointly: *Webb v. Cecil*, 48 Id. 423.

VERDICT, WHEN SET ASIDE AND NEW TRIAL GRANTED FOR EXCESSIVE DAMAGES: See *Schlencker v. Risley*, 38 Am. Dec. 100, and note; *Jacobs v. Bangor*, 33 Id. 652; *Larshet v. Forgay*, 46 Id. 554; *Clark v. Whitaker*, 48 Id. 160; *Howard v. Grover*, Id. 478. 

BENHAM v. ROWE.

[2 CALIFORNIA, 387.]

MORTGAGOR HAS RIGHT TO REDEEM WHERE MORTGAGEE BECOMES PURCHASER under a sale by virtue of a power contained in the mortgage.

MORTGAGEE IN POSSESSION NOT LIABLE FOR NOT LEASING PROPERTY DIFFERENTLY, and for rents and profits he might have thus received, if the complaint does not charge him with negligence or improper conduct in

leasing the premises, but requires him simply to account for the rent he has actually received.

MORTGAGEE IN POSSESSION MUST EXERCISE SAME CARE AND SUPERVISION OVER MORTGAGED PROPERTY that a prudent man would over his own.

MORTGAGEE IN POSSESSION IS LIABLE FOR SUCH DAMAGES AS JURY MAY ASSESS, if he acts in bad faith towards the owner of the estate or is guilty of such negligence as will greatly injure him.

SALE IRREGULARLY MADE UNDER POWER IN MORTGAGE MUST STAND, if the mortgagor does not ask to have it set aside.

MORTGAGEE SELLING UNDER POWER IN MORTGAGE FOR ARTICLE OF FLUCTUATING VALUE, instead of money, is chargeable with the highest market value of the property sold, to be credited to the account of the mortgagor.

INSTRUCTION ON QUESTION ENTIRELY ABSTRACT IS PROPERLY REFUSED.

MORTGAGEE IN POSSESSION IS NOT ENTITLED TO COMPENSATION for managing the property and collecting the rents; his care and trouble are bestowed for the furtherance and protection of his own interests; he is *quasi* owner, and is not like a mere naked trustee or agent; and he takes the charge voluntarily upon himself.

AFFIRMATIVE RESTS ON PLAINTIFF, in contemplation of law, and he has the right to open and conclude.

ACTION praying for equitable relief. According to the allegations of the complaint, Stephen J. Field, in September, October, and November, 1850, to secure his notes payable at thirty, sixty, and sixty days respectively, made three successive mortgages of property in Marysville, the first to Brumagim and Cunningham, covering what was known as the "levee property," the second to the defendant Rowe, covering the same property and a lot known as the "House lot," and the third to the defendants Ford and Goodwin, covering the "levee property" and five other lots. These mortgages each contained a power authorizing the mortgagees to sell the premises on default in payment of the notes or interest, "either at private sale or public auction, after ten days' previous notice of such intended sale, and to execute conveyances." Field subsequently, in December, 1850, conveyed all his estate to trustees for the benefit of his creditors, of whom the plaintiffs are the successors. Possession of the property mortgaged to them was taken in February, 1851, by Ford and Goodwin, and conveyances of portions of the premises were agreed to be made by Ford and Goodwin to Rowe, and by the latter to the former, Rowe also receiving under the agreement for division, a building standing on property covered by both mortgages, which he converted to his own use; and finally, on April 28, 1851, Ford and Goodwin conveyed all the property described in their mortgage, to Rowe, who, in turn, on July 21, 1851, reconveyed a portion, the first deed reciting a money consideration of three thousand nine hundred and eighty-three

dollars, and the second three thousand dollars. The amount due on the mortgage to Brumagin and Cunningham was also paid by Ford and Goodwin and Rowe. On September 26, 1851, the plaintiffs made to Ford and Goodwin a conveyance of certain property described, and the latter, a few days later, executed to Field a general release of all mortgages, notes, and demands, including half of the mortgage assigned to them by Brumagin and Cunningham. It was charged that no money consideration passed between the mortgagees on their conveyances, but that they were made for the purpose of more easily dividing the property, and forfeiting Field's rights thereto, and that sufficient notice of the sale by Ford and Goodwin to Rowe was not given to Field or to the trustees; and that also, in April, 1851, Rowe sold a lot included in his mortgage and not in the others, to one House, for one thousand dollars, and in June thereafter sold the same at public auction to the same person for two hundred dollars. The complaint seeks to charge Rowe with one thousand dollars, or the fair value of the lot sold to House, and with sums received by him as rents of the property; prays for an account and the delivery up of certain premises not conveyed by the plaintiffs on September 26th to Ford and Goodwin; that the deed of April 28, 1851, from Ford and Goodwin to Rowe be declared void so far as it covers certain lots; that the defendants acknowledge satisfaction of their mortgages and of the mortgage assigned to them by Brumagin and Cunningham, and cancel the notes; and that an injunction to restrain Rowe from collecting the rents be granted, etc. The answer of Rowe averred that certain negotiations took place between the parties, before and after notice of sale, as stated in the complaint, given in January, 1851, to one of the trustees, and that finally it was agreed among the trustees, Field, and the defendants, that the latter should pay Field's note to Brumagin and Cunningham, and take the mortgaged property, and when one of the trustees who was absent returned, the property should be conveyed to the defendants; that under this arrangement Rowe, Ford, and Goodwin took possession of the property and divided it, and paid Brumagin and Cunningham; that it was finally agreed that the trustees should execute a quitclaim deed to Rowe, Ford, and Goodwin, who were to retain the notes and mortgages until Field should execute a warranty deed to them, but the trustees afterwards refused to execute such deed, and that thereupon notice of the sale was given to the other trustee on April 16, 1851; that on April 28, 1851, Ford

and Goodwin, acting as Field's attorney, under the power, conveyed the property to Rowe, subject to the mortgages of Brumagin and Cunningham and Rowe, the further consideration being three thousand nine hundred and eighty-three dollars, the amount due Ford and Goodwin on their note and mortgage; that thereafter certain lands were quitclaimed by Rowe to Ford and Goodwin, the object of such conveyance being to perfect the titles in themselves, and accomplish what the trustees should have done; and that on May 30, 1851, notice was published by Rowe of a sale of a portion of the premises, which sale was made for two hundred dollars, at the time and place specified, to one Barnard, who bid for House, the latter paying one thousand dollars in Yuba county warrants, worth at that time forty cents on the dollar. The answer asked that the title to the property be decreed in the defendant, or that he may be paid the money due him before being compelled to part with the possession, and that the injunction be dissolved, etc. On the trial, the court decided that the defendants held the affirmative, and allowed them the conclusion, in addressing the jury, but permitted the plaintiffs to open and introduce evidence in the first place. It appeared that Rowe had contracted, prior to the day of the sale, to sell the lot to House, conditionally, however, as Rowe had set a minimum cash value of four hundred dollars on the property, and House proposed to pay in county warrants, which Rowe would not take for more than forty cents on the dollar. No attention was made to the bid of two hundred dollars on the day of the sale by House's agent, and Rowe afterwards perfected the contract previously made with House, and decreed him the lot. Certain evidence having been given as to the rate of rents of the property, the plaintiff asked that three charges be given the jury, as follows: 1. That it was Rowe's duty when he leased the mortgaged premises to do so for the customary periods for which leases were given in Marysville, by which the highest rents could be obtained; 2. That if it was the custom to lease by the month, and if this was the most advantageous mode of leasing, the jury might charge Rowe with what he might, with ordinary care, have received each month; and, 3. That if Rowe was guilty of gross negligence in the management of the property, he might be charged with the rents and profits he might have received. These instructions in their unmodified form were not given; the court inserting in the first the words "the county" instead of Marysville; charging the jury, instead of the second, that it was the duty of the

mortgagee in possession to exercise the same care and supervision over the property as a prudent man would over his own, and if he acts in bad faith towards the owner of the estate, or is guilty of such negligence as will greatly injure him, he is liable for such damages as the jury might assess; and qualifying the third in the respect that the defendants, if guilty of gross negligence, can only be charged with the difference between the rents and profits admitted to have been received and those which in the opinion of the jury they ought to have received. The fourth instruction asked was that Rowe, having in his power to show what he received for the one thousand dollars of scrip, and having neglected to do so, the jury might presume that he received the highest sum given for the scrip at any time subsequent to its receipt; but the jury were instructed that Rowe had no right to sell the property without conforming rigidly to the power contained in the mortgage, and as trustee, could not sell at private sale; 5. That Rowe, the mortgagee in possession, could not make a lease of the property, as he had done, for one year, so as to bind Field, the mortgagor, unless in case of absolute necessity; 6. That Rowe was not entitled to charge by way of commissions for his trouble in managing the property, and collecting and receiving rents. The two last instructions asked were also refused. Other instructions were given and others refused, but they are not considered in the opinion. The jury found that four thousand and fifty-five dollars was due from Field to Rowe. Judgment was entered on this verdict, and plaintiffs appealed.

S. J. Field, for the appellants.

W. H. Martin, for the respondents.

By Court, HEYDENFELDT, J. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power the mortgagee becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor. The court below therefore treated this case properly as one in which the plaintiff's right to redeem was clear.

The errors complained of arise mainly upon the charges given and refused by the court. The first three charges asked by the plaintiff were properly refused. The complaint does not charge the defendant Rowe with negligence or improper conduct in leasing the mortgaged premises. It requires him to account for the rent he actually received, and no more. But

even if he had been called on to answer a charge of that character, the instructions given by the court were as favorable to the plaintiff as the rules of law will admit.

The fourth charge was also properly refused; but the one given by the court on the question embraced in it was equally erroneous. The bill did not seek to set aside the sale made to House, and as Rowe had the power to sell, the sale must stand when the mortgagor does not complain of it.

As, however, the defendant Rowe did not effect the sale for money, but received instead an article of fluctuating value, he is clearly chargeable with the highest market value of the property sold, to be credited to the account of the plaintiff; and the court erred in not so deciding.

The fifth instruction asked by the plaintiff was also properly refused. It embraces a question which is entirely abstract, in reference to the facts of this case. It might arise hereafter between Field and the tenant, but can have no place in this decision.

The sixth instruction asked by the plaintiff ought to have been given. Where a mortgagee takes possession of the mortgaged premises, his care and trouble are bestowed for the furtherance and protection of his own interests. He is not like a mere naked trustee, nor is his capacity that of an agent. He is, while in possession, *quasi* its owner. It is a charge which he has taken voluntarily upon himself, and for which he has no right to seek a compensation out of the mortgagor.

There is but one other error which it seems proper to notice. The court decided that the defendants held the affirmative, and therefore gave them the opening and conclusion of the case.

This was clearly wrong; the plaintiff always, in contemplation of law, has the affirmative, and has the right to open and conclude.

For the errors that have been pointed out, the judgment is reversed, and the cause remanded, with costs.

MURRAY, C. J., and ANDERSON, J., concurred.

MORTGAGEE PURCHASING AT HIS OWN SALE.—A mortgagee may himself make a *bona fide* purchase of the property sold under a power of sale: *Bergen v. Bennett*, 2 Am. Dec. 281; and see *Stoeber v. Rice*, 31 Id. 495. He can not purchase at his own sale, so as to bar the equity of redemption: *Moore v. Titman*, 44 Ill. 370; and see *Thornton v. Irvin*, 43 Mo. 167, both citing the principal case.

LIABILITY OF MORTGAGEE IN POSSESSION FOR RENTS AND PROFITS: See *Breckenridge v. Brooks*, 12 Am. Dec. 401; *Gillis v. Martin*, 25 Id. 729; *Hogan*

v. *Stone*, 35 Id. 39; *Shaeffer v. Chambers*, 47 Id. 211; *Powell v. Williams*, 48 Id. 105; and for interest on the same: *Hogan v. Stone* and *Shaeffer v. Chambers*, *supra*.

ALLOWANCE TO MORTGAGEE IN POSSESSION FOR IMPROVEMENTS AND REPAIRS: See *Gillis v. Martin*, 25 Am. Dec. 729; *Hogan v. Stone*, 35 Id. 39.

DILIGENCE AND CARE TO BE EXERCISED BY MORTGAGEE IN POSSESSION: See the general rule stated in *Shaeffer v. Chambers*, 47 Am. Dec. 211; he must not permit or commit waste: Id.; *Youle v. Richards*, 23 Id. 722.

MORTGAGEE IN POSSESSION NOT ENTITLED TO COMPENSATION FOR MANAGING ESTATE: *Breckenridge v. Brooks*, 12 Am. Dec. 401.

IRREGULAR SALE UNDER POWER GOOD IF NOT OBJECTED TO BY MORTGAGOR: *Markey v. Langley*, 92 U. S. 153; *Williams v. Hatch*, 38 Ala. 342, both citing 'the principal case.

AFFIRMATIVE, ON WHOM RESTS: See *Swafford v. Whipple*, 54 Am. Dec. 498, and note.

PRINCIPAL CASE IS ALSO CITED IN *Payne v. Bensley*, 8 Cal. 267, to the point that a mortgage is a mere security for the debt, and the legal title remains in the mortgagor until foreclosure and sale.

COOKE v. SPEARS.

[2 CALIFORNIA, 409.]

OBJECT OF CALIFORNIA STATUTE IN REFERENCE TO AMENDMENTS TO PLEADINGS is the furtherance of justice, and to that extent applications for amendments ought to be treated favorably.

ALLOWING AMENDMENTS TO PLEADINGS IS PASSED TO DISCRETION OF COURT by the California statute declaring that courts may, "in furtherance of justice," permit amendments to be made; but if that discretion is shown by the record to have been abused, in that it has been illegally exercised, it would be the duty of the appellate court to correct it.

AMENDMENT SETTING UP PLEA OF STATUTE OF LIMITATIONS, IN ANSWER, WILL NOT BE ALLOWED, unless it would further the ends of justice.

STATUTE OF LIMITATIONS SHOULD BE PLEADED IN FIRST INSTANCE, and allowed no grace of right thereafter, where it is claimed solely as a legal advantage; courts are not inclined to favor statutes of limitation except when used as instruments of justice, and not of strategy.

ACTION on a claim for goods, which had been assigned to the plaintiff. The facts are sufficiently stated in the opinion.

———, for the appellant.

Cooke, for the respondent.

By Court, ANDERSON, J. This was an action brought for the recovery of a debt assigned by William S. Walton to the plaintiff. The debt and the assignment were proved, and a verdict was rendered for the plaintiff, and judgment entered accordingly. The counsel for the defendant have moved for

a new trial, upon the ground that before the jury had been impaneled, the leave of the court was asked to amend his answer by adding a plea of the statute of limitations; which was refused by the court, and to which he excepted.

The object of the statute in reference to amendments is unquestionably the furtherance of justice. So far as that goes, courts ought to be disposed to treat such applications favorably. In most instances it is a matter of course that they should be granted; but courts have not been inclined to look very kindly upon statutes of limitation, except where they were used as the instruments of justice, and not of strategy. For example, there is a wide distinction between the protection of minor heirs by such means, and the facility on the other hand, afforded to the wary and skillful, of escaping from the payment of an equitable demand. In the first case, the whole scope, force, and effect should be given to the law; in the latter, it would only be reluctantly allowed its course for the sole end of maintaining it as a general rule of conduct. The single evil of that occasion would be less pernicious than the violation of the law, for the purpose of doing justice.

It is true also, in some codes of practice, grown up, no doubt, out of reasons like the preceding, that courts require that a statute of limitation, if applicable, should be pleaded in the first instance. The legal policy of all this must depend very much upon the character of the statute itself; but as a general principle, I deem it an utterly unsafe rule to go by. It is better to bring it so far within the discretion of the court as to allow it to be pleaded at any time upon terms, if it be proper, where the ends of justice will be attained by it. A wise legislation ever contemplates this result, and we are, therefore, bound to presume that the language of our statute authorizing the allowance of amendments, was with this particular view. The section of the statute upon this subject begins by declaring that courts may, "in furtherance of justice," permit amendments to be made. This certainly passes the whole matter to the discretion of the court. If the record in any such case should disclose, however, that discretion to have been abused, which means no less and no more than being illegally exercised, it would be the duty of the appellate court to correct it, and apply the remedy as promptly as though the error had occurred from any other cause. In this case, there is nothing which shows that the court erred. Exactly the contrary may reasonably be inferred.

If the statute of limitations had been pleaded in the first in-

stance, there would have been no ground to have objected to it, and the court would have had no legal discretion to have ordered it to be stricken out. But having been omitted, when the application to amend was made, the first question certainly presented was, Will it be in the furtherance of justice? Such is the language of the statute. Such clearly was the intent of the law.

The words "may" and "shall," it is true, should be considered in the construction of the law as convertible terms. But we take it, that the judge below was not bound to allow the amendment, unless it would further the ends of justice. He refused it, doubtlessly believing the contrary; and we think he did right, as he also did in refusing a new trial. The same reason continues.

The record does not disclose that any attempt was made by the defendant, by affidavits or otherwise, to show that it was necessary to permit the amendment, in order to obtain justice. It was claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation, that it should have but its day in pleading, and no grace of right after, beyond the extent of justice. If that existed in this case, it was not shown. If it had been so, the case would have presented very different legal pretensions to the consideration of this court.

Let the judgment be affirmed, with costs.

ALLOWING AMENDMENTS ADDRESSED TO SOUND DISCRETION OF COURT: *Robbins v. Treadway*, 19 Am. Dec. 152; *Newell v. Hussey*, 36 Id. 717; *Waterman v. Hall*, 42 Id. 484; *Cartwright v. Chabert*, 49 Id. 742; and as to the allowance of amendments generally at common law and under the code, see note to *Stevenson v. Mudgett*, 34 Id. 158.

PRINCIPAL CASE IS CITED IN *Napa Valley R. R. v. Napa County*, 30 Cal. 437, to the point that where a public body or officer has been "empowered" to do an act which concerns the public interest, the execution of the power may be insisted on as a duty.

ADAMS v. BLANKENSTEIN.

[2 CALIFORNIA, 413.]

COMMON CARRIER DELIVERING GOODS TO ANY BUT OWNER DOES SO AT HIS PERIL.

COMMON CARRIER MUST SHOW DELIVERY OF GOODS TO DULY AUTHORIZED AGENT, in an action for their loss, where a delivery is made to a person other than their owner.

COMMON CARRIER NOT RELIEVED OF RESPONSIBILITY FOR LOSS by delivery of goods through mistake or gross imposition to one not their owner.

AUTHORITY TO DELIVER GOODS TO COMMON CARRIER CONFERS NO AUTHORITY TO COUNTERMAND SHIPMENT, or to take back the goods.

ACTION brought against Adams & Co., the defendants below, claiming that the plaintiff had delivered to the defendants a package of jewelry, of the value of three thousand dollars, to be conveyed to Panama, and that through the negligence of the defendants the package was not delivered, but had been lost. Damages to the amount of four thousand dollars were alleged. It appeared that the package in question, on which a value of one thousand dollars was placed, was given by the plaintiff to one Coleman, but who called himself "Henry Winter," to be carried to the defendants' office, where he received the following receipt: "Received of Henry Winter one package addressed 'P. Lee, Panama,' valued at one thousand dollars. Freight and insurance paid here, fifty dollars. (Signed) for Adams & Co., Charles H. Davis;" and that several days afterwards, Coleman called and requested the defendants to detain the package, and still later asked its return to him, together with the charges paid thereon. The defendants desired the receipt returned, but Coleman stated that he had lost it, and on this assurance the package and the fifty dollars were returned to Coleman. The receipt, indorsed by P. Lee, was produced by the plaintiff on the trial. The jury were instructed that the defendants had no right to deliver the package to Coleman, unless he produced the receipt, or else it was in proof that the same was lost, or Coleman was the owner; that if the shipper was the owner in fact, the carrier was bound to deliver to him when demanded; that if the plaintiff delivered the box to Coleman, and the latter had no interest in the same, but it belonged to the plaintiff, and the plaintiff demanded it, and produced the receipt, then the plaintiff was entitled to a verdict; that if the plaintiff was a party to the fraud practiced on the defendants, or connived at it, the defendants were entitled to a verdict; and that under no circumstances could the plaintiff recover more than one thousand dollars. The plaintiff had a verdict for one thousand dollars; a new trial was refused, and the defendants appealed.

Judah, for the appellants.

Feum, for the respondent.

By Court, HEYDENFELDT, J. The delivery of goods by a carrier to an agent of the owner is, of course, a sufficient delivery,

but the defense in such a case must clearly show that the person to whom the goods were delivered, as agent, was duly authorized as such; for if he delivers to any but the owner, he does so at his peril. And although the delivery to a wrong person is made by mistake, or by gross imposition, the carrier will be responsible for the value of the goods.

In this case, although Coleman was the agent of the plaintiff to deliver the parcel to the carrier, there is no proof of his authority to take it back or to countermand the shipment. It was altogether a loose transaction. The defendants did not know that Coleman was either owner or consignor, or the agent of either; and they did not attempt to find out his authority. Their liability is unquestionable, and the judgment is affirmed, with costs.

MURRAY, C. J., and ANDERSON, J., concurred.

DELIVERY REQUIRED OF COMMON CARRIER: See *Ostrander v. Brown*, 8 Am. Dec. 211, and note; *Kohn v. Packard*, 23 Id. 453; *Parsons v. Hardy*, 28 Id. 521; *Hill v. Humphreys*, 39 Id. 117; *Farmers' and Mechanics' Bank v. Champlain Trans. Co.*, 42 Id. 491; S. C., *ante*, p. 68, and notes; *Stone v. Waitt*, 52 Id. 621. A delivery by a carrier must be to the consignee personally, unless some usage or agreement is shown to the contrary: *Gibson v. Culver*, 31 Id. 297, and see in particular, to whom delivery must be made, note to *Ostrander v. Brown*, 8 Id. 218.

DE WITT v. HAYS.

[2 CALIFORNIA, 463.]

RIGHT TO COLLECT WHARFAGE OR DOCKAGE IS FRANCHISE OR INCORPORATED HEREDITAMENT, an uncertain profit issuing out of realty, and is neither real estate nor personal property.

QUO MODO OF TAXATION IS MATTER OF LEGISLATIVE CONTROL, and the statute must be steadily followed, notwithstanding the constitution provides that all property shall be taxed.

RIGHT TO COLLECT WHARFAGE AND DOCKAGE IS NOT WITHIN CALIFORNIA REVENUE ACT OF 1851, and the naked right can not be assessed *eo nomine* and made liable.

DISTINCTION BETWEEN LAW AND EQUITY AS TO ACTIONS IS NOT ABOLISHED by the California practice act in providing that "there shall be but one form of civil action;" the innovation extends only to the form of the action and the pleadings.

TO ENTITLE PLAINTIFF TO EQUITABLE INTERPOSITION UNDER REFORMED PROCEDURE, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate relief at law.

ALLEGATION OF IRREPARABLE INJURY IS INSUFFICIENT FOR EQUITABLE INTERPOSITION by way of injunction; it must appear from the facts set forth in the bill.

CLOUD ON TITLE NOT CAST, NOR IRREPARABLE INJURY WROUGHT, by the sale of a wharf for taxes, where the plaintiffs do not pretend to a title in the soil, but only to an interest in the franchise.

PERFECT REMEDY EXISTS AT LAW, AND EQUITY HAS NO POWER TO INTERFERE if a tax upon a franchise has been illegally interposed, or a valid objection appears upon the face of the proceedings.

ABUSE OF WRIT OF INJUNCTION SHOULD BE CHECKED.

ACTION to restrain a sale for taxes. The facts sufficiently appear in the opinion.

Hastings, Thomas, and Morse, for the appellant.

Parsons and Cooke, for the respondents.

By Court, MURRAY, C. J. The respondents, as trustees of the Pacific Wharf Company, plaintiffs in the court below, filed their bill to enjoin the collector of taxes from proceeding to sell Pacific wharf for a certain tax assessment made thereon, in the name of Pacific Wharf.

The bill alleges that said assessment is irregular, illegal, and void; and that said sale of the collector of taxes will work an irreparable injury, and prays an injunction to restrain the same. A temporary injunction was awarded by the court.

The defendant afterwards demurred to the bill for want of proper parties, and of jurisdiction in the court below, which was overruled, from which judgment on demurrer the defendant appealed.

The legality of the assessment is not necessarily in question, as this case must turn on the jurisdiction below; but inasmuch as this point was fully discussed upon the argument, and the question may again present itself, we think it best to give a judicial construction to the revenue act of 1851. The bill alleges the title of land upon which Pacific wharf is erected is in the city of San Francisco, which must be taken as admitted by the demurrer.

The right of the plaintiffs in the premises is simply a right to collect wharfage and dockage for a certain term of years, and is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of the realty. While the constitution provides that all property shall be taxed, etc., still the *quo modo* is a matter of legislative control, and the statute must be steadily followed.

The interest of the plaintiffs does not come under the head of personal property or real estate as defined by the statute of 1851. The legislature has omitted to provide for any tax upon

this species of property, and the naked right to collect wharfage can not be assessed *eo nomine*, or made liable. We do not, however, wish to be understood as deciding that property in a wharf or the stock of the company is not the proper subject of taxation. Admitting, however, that the assessment is illegal, are the plaintiffs entitled to a remedy by injunction?

The legislature, in providing that "there shall be but one form of civil action," can not be supposed to have intended at one fell stroke to abolish all distinction between law and equity, as to actions. Such a construction would lead to infinite perplexities and endless difficulties. The innovation extends only to the form of action and the pleadings, while the technicalities of pleading have been dispensed with; and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in *assumpsit*, trespass, or ejectment, without regard to the ancient forms; still the distinction between those actions has not been abolished, but remains the same. So cases legal and equitable have not been consolidated; and though there is no difference between the form of a bill in chancery and a common-law declaration, under our system, where all relief is sought in the same way from the same tribunal, the distinction between law and equity is as naked and broad as ever. To entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law.

In the present case, under an allegation of irreparable injury, the plaintiffs seek to avail themselves of the writ of injunction, which has been styled "the right arm of the law." The simple allegation of irreparable injury is not sufficient; it should appear to the court from the facts set forth in the bill. The sale of Pacific wharf can neither cloud the title of the plaintiffs nor work an irreparable injury to them. They do not pretend to a title in the soil, but only to an interest in the franchise. If the tax upon the franchise has been illegally imposed, or a valid objection appears upon the face of the proceedings, they have a perfect remedy at law, and a court of equity has no power to interpose: *Van Rensselaer v. Kidd*, 4 Barb. 17; *Van Doren v. Mayor of N. Y.*, 9 Paige, 388; and *Wiggin v. Mayor of N. Y.*, Id. 16. The case of *Osborn v. Bank of the United States*, 9 Wheat. 738, was strongly relied on by the counsel for the respondent as supporting the jurisdiction of the court by injunction in all cases of franchise; much of the reasoning of that case is inap-

plicable to the present one, and the court seem to base their argument on the supposition that the tax upon the bank would work an irreparable injury, by destroying the franchise, and driving the institution from the state; and that the state might be unable to respond in damages for the injury. There is a wide difference in the two cases, and no pretense is made that the sheriff is unable to satisfy any damages that may accrue, or that the franchise will be destroyed.

The practice of granting writs of injunction in every conceivable case affecting personal and real estate, and restraining persons in the enjoyment of their property, has been carried to a greater extent perhaps in this state than any other; so much so as to impair the efficiency of and benefits arising from the judicious exercise of this power. These abuses ought to be checked by this court wherever they occur.

We are of opinion the injunction was improvidently granted, and that the plaintiffs are not entitled to the relief prayed for, having a sufficient remedy at law.

Judgment of the court below reversed, and the injunction dissolved.

ANDERSON, J. I concur in the opinion.

TAKING OF WHARFAGE OR TOLL IS FRANCHISE: *Lansing v. Smith*, 21 Am. Dec. 89. As to what are franchises, see *State v. Real Estate Bank*, 41 Id. 109.

FRANCHISE IS LIABLE TO TAXATION: *Mayor etc. of Baltimore v. Baltimore & O. R. R.*, 48 Am. Dec. 531; and see *Stevens v. State*, 45 Id. 72.

QUO MODO OF TAXATION SUBJECT TO LEGISLATIVE CONTROL: See *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and notes thereto.

EQUITABLE RELIEF, WHEN GRANTED UNDER REFORMED PROCEDURE: See *Minturn v. Hays*, *post*, p. 366. An extended quotation, in regard to the effect of the reformed procedure upon legal and equitable primary rights, duties, and liabilities, will be found given with approval in Pomeroy's *Rem. & Rem. Rights*, sec. 68. See also *Neill v. Keese*, 51 Am. Dec. 746, as regards the administration of law and equity by the same forum in Texas.

FACTS TO BE STATED IN BILL WHERE IRREPARABLE INJURY SOUGHT TO BE RESTRAINED: *White v. Flannigan*, 54 Am. Dec. 608.

INJUNCTION, WHETHER GRANTED TO RESTRAIN COLLECTION OF TAX: See *Burnet v. Cincinnati*, 17 Am. Dec. 582; *McCoy v. Chillicothe*, Id. 607; and see *Bank of Utica v. City of Utica*, 27 Id. 72; *Minturn v. Hays*, *post*, p. 366. An injunction will not be granted when the invalidity of the tax appears upon the face of the proceedings, since in such a case the remedy at law is perfect: *Bucknell v. Story*, 36 Cal. 71; *Robinson v. Gaar*, 6 Id. 275; and see *Coulson v. Harris*, 43 Miss. 759, all citing the principal case to this point; but if a tax deed is made by the legislature *prima facie* evidence of what it contains, the rule is otherwise: *Palmer v. Boling*, 8 Cal. 388, distinguishing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Trinity Co. v. McCammon*, 25 Cal. 120, to the point that an injunction will not be granted where no irreparable damage, and no damage at all, can result; and in *Hager v. Shindler*, 29 Id. 55, as recognizing the general rule that the equity jurisdiction is limited to cases where there is no remedy at law, or none that is plain, adequate, and complete, but as throwing little or no light upon the question whether the purchaser at a sheriff's sale has a right to go into equity to have a fraudulent deed of the judgment debtor set aside.

RIGGS v. WALDO.

[2 CALIFORNIA, 485.]

GUARANTOR IS TERM APPLIED TO ONE WHO PUTS HIS NAME ON BACK OF PROMISSORY NOTE out of the course of regular negotiability, and this is so whether his inscription is simply in blank or preceded by the words "I guarantee," etc.; such person is not an indorser according to strict commercial meaning.

GUARANTY OF PROMISSORY NOTE IS NOT WITHIN STATUTE OF FRAUDS for want of an expressed consideration in writing; a consideration is imported because the contract is a promissory note; and each one who writes his name upon the note is an original undertaker.

UNDERTAKING OF GUARANTOR OF PROMISSORY NOTE IS ATTENDED WITH ALL RIGHTS AND LIABILITIES OF INDORSER *stricti juris*; and in order to charge him, therefore, presentment of the note must be made to the maker at maturity, and due notice of non-payment given.

ACTION by the indorsee of a promissory note for one thousand five hundred dollars, against Waldo, the maker, and Henley & Hastings, the guarantors. The complaint alleged that for a valuable consideration Henley and Hastings guaranteed the note as follows: "We guarantee the payment of the within. (Signed) Henley & Hastings." The guarantors demurred to the complaint, on the grounds, among others, that no consideration was expressed in the alleged guaranty; and that no cause of action was set forth against them. The demurrer was sustained, and judgment given against Waldo, who had made default. The plaintiff appealed from the judgment sustaining the demurrer.

———, for the appellant.

Hastings, for the respondents.

By Court, HEYDENFELDT, J. One who puts his name on the back of a promissory note out of the course of regular negotiability is not an indorser according to strict commercial meaning. He is termed a guarantor, and this is so, whether his

inscription is simply in blank or preceded by the words "I guarantee," etc.

The first question here is, whether this kind of guaranty is within the statute of frauds for the want of an expressed consideration in writing. The point is not a new one. It has arisen before in many, and probably in every commercial country which has adopted the English statute of frauds. While there has been some conflict in the opinion of different courts, the main current of decisions and the better reasoning maintain the negative of the proposition.

The contract imports a consideration because it is a promissory note. Each one who writes his name upon it is a party to it, and, from its commercial character, each party to it is an original undertaker. The liability of one may be with conditions, that of others without any; or, in other words, the liability may be primary and secondary. But each name constitutes a direct original promise founded upon the same consideration.

In regard to the character of the guarantor's liability there has been much more conflict of decisions. In New York and some other states he is placed upon the same footing as the maker. In others, again, his liability is secondary, and must be fixed by due diligence to enforce the contract against the principal; and in some it is hard to discern what doctrine is intended, as it seems that each decision is made for the particular case, and not for the establishment of a permanent rule.

Judge Story, in his treatise on promissory notes, says: "The guarantor contracts, upon the dishonor of the note, that he will pay the amount upon a presentment being made to the maker, and notice given him of the dishonor of the note within a reasonable time." And he then goes on to say, that what is reasonable time must be determined by the fact whether the guarantor has been injured for the want of reasonable notice.

It is with some hesitation that I am constrained to dissent from such a distinguished writer. But his doctrine would equally maintain the ground against any notice whatever, for it would always be difficult, if not impossible, to determine that the mere want of notice inflicted the injury. The greatest objection to it is that it is no rule at all. It leaves every case open to uncertainty, forces every contract of the kind into litigation, and each case having to be determined according to its own particular facts, its decision would scarcely ever be useful in the adjudication of any other case.

The wants of a commercial community demand a rule which

is simple and certain; and this can be readily attained by a resort to the principles of the common law.

A name written on the back of a note gave to the writer his title of indorser, and fixed the character of his liability. If the name was written without regular succession, according to commercial usage, a distinction in the description of the latter was instituted, and he was called "guarantor." This distinction, however, was only in name—the act performed by each is precisely the same; and it is a well-settled and safe rule, that the act discloses the intent. When this irregular mode of security was first resorted to, it is hardly within the compass of reason to suppose that the guarantor or the holder imagined that the undertaking was in any respect different from that of an indorsement. And it has only been made so by those minds which rather indulge in nice distinctions and subtle refinements than lean upon the plain, substantial reason, which is the foundation of the law.

The contract of an indorser is simply a guaranty, or declaration that he will pay, if the maker does not pay upon presentment, if he receives due notice. Now if this legal definition of his liability was written over his signature, would it alter his liability? And if not, is the term "guaranty" potent enough in its true signification to alter his condition?

Blackstone says: "Each indorser is a warrantor for the payment of the bill." He there uses the term "warrantor," which we have superseded by the term "guarantor." There can be no real distinction between the two, for the one is a synonym of the other. If, then, the indorser is the warrantor, the liability of the guarantor must be the same as the liability of the indorser. It follows from this view, that where one writes his name on the back of a promissory note, either in blank, or accompanied by the use of general terms, his undertaking is attended with all the liability and all the rights of an indorser *stricti juris*.

In this case the declaration does not aver a presentment of the note to the maker at maturity, and due notice of non-payment to the guarantors.

The judgment is affirmed, with costs.

INDORSEMENT OF NEGOTIABLE PAPER BY ONE NOT HOLDER OR PAYEE.—The decisions are not unanimous in regard to the effect of such an indorsement; see in general the notes to *Fitzhugh v. Love's Ex'r*, 3 Am. Dec. 571; *Perkins v. Catlin*, 29 Id. 297; for cases where the indorser was held to be an original promisor or maker, see *Hunt v. Adams*, 4 Id. 68; *White v. Howland*,

6 Id. 71; *Moies v. Bird*, Id. 179; *Baker v. Briggs*, 19 Id. 311; *Bright v. Carpenter*, 34 Id. 432; *Martin v. Boyd*, 35 Id. 501; *Nash v. Skinner*, 36 Id. 338; *Samson v. Thornton*, 37 Id. 135; *Powell v. Thomas*, 38 Id. 465; *Stoney v. Beaubien*, 39 Id. 128; *Gist v. Drakely*, 41 Id. 426; *Union Bank v. Willis*, Id. 541; *Sylvester v. Downer*, 49 Id. 786; *Colburn v. Averill*, 50 Id. 630; and see *Wylie v. Lewis*, 18 Id. 108; *Prosser v. Luqueer*, 40 Id. 288; cases holding him to be a guarantor: *Tenney v. Prince*, 16 Id. 347; *Oxford Bank v. Haynes*, 19 Id. 334; *Camden v. McKoy*, 38 Id. 91; *Whiton v. Mears*, 45 Id. 233; *Colburn v. Averill*, 50 Id. 630; and see *Perkins v. Catlin*, 29 Id. 282; cases holding him to be an indorser: *Aiken v. Cathcart*, 45 Id. 764; and see *Fitzhugh v. Love's Ex'r*, 3 Id. 568; *Prosser v. Luqueer*, 40 Id. 288. The principal case was cited in *Ford v. Hendricks*, 34 Cal. 675, to the point that where one indorsed a promissory note before delivery to a payee he was liable as a guarantor; and also to the same effect, see *Firman v. Blood*, 2 Kan. 526. In *Pierce v. Kennedy*, 5 Cal. 139; *Jones v. Goodwin*, 39 Id. 494, 495, it was cited to the proposition that a guarantor of a promissory note, or a stranger who indorses it before delivery, is liable as an indorser, and demand and notice is necessary to bind him; while in *Brady v. Reynolds*, 13 Id. 32, it was said of the decision that it only went to the extent of holding that a notice of protest was essential to charge a guarantor as an indorser, and that it did not change the previous rule in relation to guarantors in any respect. In *Bryan v. Berry*, 6 Id. 396, 397, it was referred to in holding that it was immaterial on what part a secondary indorser placed his name; if the character of his liability was made to appear, his rights were those of an indorser; but it was held in *Kritzer v. Mills*, 9 Id. 23, that where a note was signed by two persons in the same manner, with nothing on its face to show that one was merely a surety, the case did not fall within the doctrine of *Riggs v. Waldo*, and the latter could not set up in defense that he was such, and that the plaintiff had not sued in time, and had given no notice of demand and protest. *Geiger v. Clark*, 13 Id. 580, and *Reeves v. Howe*, 16 Id. 153, both cite the principal case to the point that the guarantor of a promissory note is entitled to notice of non-payment; and *Lightstone v. Lawrence*, 4 Id. 277, to the point that a declaration is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegations of demand and notice. Finally, in *Fessenden v. Summers*, 62 Id. 485, the court, after reviewing many of the preceding cases which cite the principal case, and which it regards as conflicting, holds that the question of the liability of a person not a party to a note who indorses the same before delivery, is settled by section 3117 of the California civil code, and such person is to be regarded not as a guarantor, but as an indorser, and as such is entitled to notice of non-payment. See further, as to the necessity of demand and notice to charge a guarantor, *Whiton v. Mears*, 45 Am. Dec. 233, and note collecting prior cases.

GUARANTIES REQUIRED TO EXPRESS CONSIDERATION BY STATUTE OF FRAUDS: *Union Bank v. Coster*, 53 Am. Dec. 280, and note. The principal case is cited in *Ford v. Hendricks*, 34 Cal. 675; *Howland v. Aitch*, 38 Id. 135, to the point that the promise of a guarantor of a promissory note is not within the statute of frauds if made before delivery of the note, though the consideration be not expressed.

GODEFFROY v. CALDWELL.

[2 CALIFORNIA, 489.]

MECHANIC'S LIEN LAW PROVIDES EXCLUSIVELY FOR SECURITY OF MATERIAL-MEN AND LABORERS, and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can claim no benefit of the law.

OWNER OF LAND IS ESTOPPED FROM SETTING UP TITLE AGAINST INNOCENT PURCHASER, where he stands by and sees another sell it without making known his claim. *Per* Heydenfeldt, J.

OWNER OF LAND IS ESTOPPED FROM SETTING UP RIGHT, where he knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title. *Per* Heydenfeldt, J.

PRIORITY IS TAKEN OVER MORTGAGE BY CLAIM FOR MONEY ADVANCED for the erection of a building on the mortgaged premises, where the holder of the mortgage invites the expenditure and asserts that the person advancing the money shall be protected.

ASSIGNEE OF MORTGAGE TAKES SUBJECT TO ADVERSE CLAIM, where he has full notice of the claim before assignment; and the designation of the claim by an improper term makes no difference, where all the circumstances under which it came into existence were fully detailed.

MORTGAGE IS MERE SECURITY FOR PAYMENT OF MONEY, and no breach of its conditions can possibly vest the title in the mortgagee. *Per* Heydenfeldt, J.

PAROL PROMISE TO PAY FOR IMPROVEMENTS MADE UPON LAND is not within the statute of frauds.

ACTION to foreclose a mortgage. The mortgage had been made on July 19, 1850, to one Skinner, by the defendant Caldwell, and assigned to the plaintiff on August 16, 1851, by one Wells, attorney in fact for Skinner. The buildings on the mortgaged premises were destroyed by fire on May 4, 1851, and the defendant Rodgers was applied to by Caldwell for a loan, with which to rebuild them. Rodgers at first refused, on account of the lien of the mortgage, but on being assured by Wells that the holder of the mortgage would look to nothing but the naked lot for payment, and that Rodgers might feel secure in his advances, Rodgers furnished the means for rebuilding, and on June 3, 1851, filed a notice of intention to hold a lien upon the house, etc., erected. Rodgers claimed priority of payment of the balance due him, and costs, out of the proceeds of sale of the mortgaged premises. The jury were charged that Rodgers' alleged lien could not operate against the plaintiff, either as a lien under the statute or by agreement with Wells, and directed them to find for the plaintiff. Defendants excepted to the charge.

Hambly, for the appellants.

McAllister, for the respondent.

By Court, HEYDENFELDT, J. The mechanic's lien law provides exclusively for the security of materialmen and laborers; and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the law. The case of the appellant must, therefore, be considered upon its strict equity, aside from any claim to a mechanic's lien. It is a well-settled rule of all courts of equity, that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule, it is also a familiar principle, that one who knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right.

The equity set up by the appellant in this case is much stronger than in the case stated in the rule. Instead of Wells being a silent and passive spectator of the expenditure made by the appellant, he actually directs or invites it, giving at the same time a specific promise of protection. It follows, that as between Wells and Rodgers there can be no doubt of the equitable right of the latter.

The respondent became the assignee of Wells, with full notice of the claim of Rodgers before the assignment. It is true that the claim was called a mechanic's lien, when it had no validity as such, but all the circumstances under which it came into existence were fully and particularly detailed; and the designation of a contract by an improper term can not be allowed to take away a substantial right. The information was sufficient to put the party upon full inquiry, and to enable him to ascertain by legal advice the exact rights of all parties.

Is, however, the parol contract between Wells and Rodgers within the statute of frauds? It will be seen that it was a stipulation that Rodgers should advance money to be expended in building upon the lot in question, and should be protected for his expenditure. The performance of his stipulation, on the part of Rodgers, was complete; and it is well established that in some cases part performance only will take a case out of the statute of frauds. But this is not, as is contended, the case of a release of a mortgage, or a release of an interest in land, strictly speaking. Mortgages at the present day are considered as merely securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee. The contract, according to its most simple and direct interpre-

tation, is a promise to repay money expended for improvements, out of a specific fund, to wit, out of the mortgaged premises; and Chancellor Kent says that a parol promise to pay for the improvements made upon land is not within the statute of frauds: 4 Kent's Com. 450.

This view of the proper construction of the contract also disposes of the question raised in reference to the power of attorney from Skinner to Wells. Indeed, the power given to Wells is extensive enough to authorize any fair disposition of the mortgaged premises; and it is only by force of this construction that Godeffroy himself (who claims under an assignment made by Wells, as attorney of Skinner) can have any rights to be enforced.

The decree of the court below is reversed, with costs, and the case remanded.

LENDER OF MONEY TO DISCHARGE DEBTS WHICH WERE STATUTORY LIEN HAS NO LIEN: *Goldsmith v. Stetson*, 39 Ala. 183, citing the principal case. No lien arises for the purchase money when loaned by a third person to the purchaser of land: *Stansell v. Roberts*, 42 Am. Dec. 193.

ESTOPPEL OF OWNER OF LAND FROM SETTING UP TITLE where he acquiesces in or invites its disposition to another: See *Engle v. Burns*, 2 Am. Dec. 593; *Storrs v. Barker*, 10 Id. 316; *Buchanan v. Moore*, 15 Id. 601; *Morrison v. Caldwell*, 17 Id. 84; *Henderson v. Overton*, 24 Id. 492; *Watkins v. Peck*, 40 Id. 156; *Blanchard v. Allain*, 52 Id. 594; and see *Doe ex dem. McPherson v. Walters*, 50 Id. 200.

ESTOPPEL OF OWNER STANDING BY AND PERMITTING EXPENDITURES OR IMPROVEMENTS WITHOUT DISCLOSING TITLE: See *Davis v. Simpson*, 9 Am. Dec. 500; *Town v. Needham*, 24 Id. 246; *Crest v. Jack*, 27 Id. 353; *Gray v. Bartlett*, 32 Id. 208; *Casey's Lessee v. Inloes*, 39 Id. 658.

MORTGAGEE, WHEN ESTOPPED BY ACTS FROM ASSERTING CLAIM: See *Taylor v. Cole*, 6 Am. Dec. 526; *Brinckerhoff v. Lansing*, 8 Id. 538; *Lasselle v. Barnett*, 12 Id. 217; *Fay v. Valentine*, 22 Id. 397; *L'Amoureux v. Vandenburg*, 32 Id. 635.

ASSIGNEE OF MORTGAGE, WITHOUT NOTICE, NOT SUBJECT TO EQUITIES OF THIRD PERSONS AGAINST ASSIGNOR: *Mott v. Clark*, 49 Am. Dec. 566.

CERTIFICATE OF MECHANIC'S LIEN, WHAT TO CONTAIN: See *Bank of Charleston v. Curtiss*, 46 Am. Dec. 325.

MORTGAGE, WHERE CONSIDERED MERE SECURITY: See *Waring v. Smyth*, 47 Am. Dec. 299; *Hall v. Savill*, 54 Id. 485, and notes thereto. The principal case was cited in *Payne v. Bensley*, 8 Cal. 267; *McMillan v. Richards*, 9 Id. 409, to the point that a mortgage is a mere security for the debt, and the legal title remains in the mortgagor until foreclosure and sale.

PAROL CONTRACTS TO PAY FOR IMPROVEMENTS ON LAND ARE NOT WITHIN STATUTE OF FRAUDS: *Frear v. Hardenbergh*, 4 Am. Dec. 356; *Zickafosse v. Hulick*, 39 Id. 458. The principal case was cited in support of this proposition in *Thouvenin v. Lea*, 26 Tex. 615.

ROGERS v. HUIE.

[2 CALIFORNIA, 571.]

CONVERSION IS GIST OF ACTION OF TROVER, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained.

TROVER WILL NOT LIE UNLESS DEFENDANT HAS CONVERTED PROPERTY TO HIS OWN USE; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied.

AUCTIONEER NOT LIABLE TO TRUE OWNER AS FOR CONVERSION, where he receives and sells stolen goods in the regular course of business, and pays over the proceeds of sale to the felon without notice that the goods were stolen.

ACTION against an auctioneer as for conversion, in which he was held liable. The opinion states the facts.

Barbour and Rice, for the appellant.

Noyes, for the respondent.

By Court, HEYDENFELDT, J. The question to be here decided is, whether an auctioneer, who, in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is liable to the true owner as for a conversion.

The only case precisely similar to this is *Hoffman v. Carow*, 22 Wend. 285. That case was decided by the New York court of errors, composed then of chancellor and senate, and upon the question there was a dissenting opinion and a divided vote. The majority of the court held that the auctioneer was liable. The opinions are long, and there is much argument placed on the ground of convenience. To this it can be very briefly replied, that there is as much or more of that species of reasoning deduced on the other side, and which will occur readily to any one who considers the subject. The chancellor commences his opinion thus: "The simple question presented for our decision in this case is, whether the purchaser of stolen goods, who afterwards sells them as his own to a *bona fide* purchaser, is liable to the owner of the goods in an action of trover for such conversion thereof to his own use."

It will be seen at one view, that he mistakes the facts in calling the auctioneer "the purchaser;" and he is guilty of *petitio principii* in styling the act of the auctioneer "a conversion thereof to his own use," because the very point to be decided was, whether it was conversion or not. And as that is also the point to be here decided, it will only be necessary to examine

the doctrine of conversion as expounded by writers upon the action of trover. The conversion, it will be conceded, is the gist of the action, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained. In illustration of this, it is settled that a bailee is not liable in trover where the goods have been lost or stolen, for there is no actual conversion. Stephens says trover is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. Chitty says: "The refusal to deliver goods on demand will not in all cases constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained:" 1 Chit. Pl. 160.

Lord Mansfield says, in a case quoted 3 Steph. N. P.: "A mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel." [The case evidently referred to is *Fouldes v. Willoughby*, 8 Mee. & W. 540, commented upon in 3 Steph. N. P. 2684, and the language attributed to Lord Mansfield is substantially that used by Lord Abinger.] I have thus quoted enough to show the doctrine of the law as it is laid down by the most approved authorities.

From these, it appears to me, that to be guilty, the defendant must have converted the property to his own use; and if not, then any other act, to amount to a conversion, must be done with a wrongful intent, either expressed or implied. If one destroys a chattel wantonly, this is a wrongful intent expressed. In the case of a common carrier, who delivers goods by mistake to the wrong person, this is a wrongful intent implied, because his undertaking was absolute to deliver to the right owner.

In the case under review the defendant certainly did not convert to his own use; and it would be impossible to say that he was guilty of a wrongful intent, expressed or implied, when it is clear that he had no notice of the rightful ownership of the property, and was in the regular pursuit of his business as a public auctioneer. He was the mere agent for the transmission of the property from one hand to another. Each act committed in connection with the goods was not his act, but that of his employer. And although he might be liable to the vendee, if he did not at the sale disclose his principal, yet that liability would arise from a different doctrine entirely.

A case somewhat alike in principle to this is *Greenway v. Fisher*, 1 Car. & P. 190, where it appeared that one of the defendants was a packer, who merely shipped goods which had been pledged by factors for their own debt. Abbott, C. J., said: "On the part of Woodward, reliance is placed, I think properly, on the circumstance of his acting in the ordinary course of his business; and I am of opinion that the course of trade in this instance furnishes an exception to the general rule; the distinction between this case and that of a servant is, that here is a public employment; and as to a carrier, if while he has the goods trover will lie; but if while he is a mere conduit pipe in the ordinary course of trade, I think, he is not liable."

This case was cited by the counsel in the argument, in *Hoffman v. Carow*, *supra*, but is not noticed in the opinions of any of the majority of the court, nor is the reasoning of Chief Justice Abbott at all answered. It is true, Senator Verplanck notices the argument, and in reply says: "I can not think the law charges one who had accidentally a temporary possession of goods, without claim of property, and with which he had parted before demand. It requires a wrongful taking or conversion of the thing itself to make the transaction tortious." It is only necessary to quote this much of the senator's language to give a complete refutation to his conclusion. He could not, in any stronger terms, have declared his opinion of the innocence of the plaintiff in error in that case.

The case of *Saxeby v. Wynn*, cited in 3 Stark. Ev., 3d ed., 1160, note, is a case of much analogy in doctrine to the present. It is there held that, in many instances, proof of notice of the particular circumstances is necessary in order to show that the act of the defendant amounts to a conversion. Thus, where an agent has the goods of his principal in his custody, and delivers them according to the order of his principal, without notice of the previous transfer by the principal, he is not guilty of a conversion.

The case cited and the case at bar are both cases of agency. In the one case the agent delivered the goods improperly, but without notice of the fraud of his principal; in the other, the agent delivers or sells improperly, but without notice of the felony of his principal; thus there is an evident similarity. Now suppose, after the sale by the auctioneer, the vendee had refused to take the goods, and returned them to the auctioneer, and he to his principal, would the liability of the auctioneer be insisted on? I put it thus strongly to show that such proposi-

tion would shock our common sense of justice. And yet it is in effect not different from the facts of this case, except that it would be a stronger case of interference with and control over the property; for there are three distinct acts: a sale, a rescission, and a delivering over to the employer—all potent symbols of ownership.

I am satisfied that the decision in *Hoffman v. Carow*, 22 Wend. 285, is not law; and in this case the judgment is reversed with costs

ANDERSON, J., concurred.

WHAT CONSTITUTES CONVERSION: See *Ragsdale v. Williams*, 49 Am. Dec. 406, and note collecting prior cases; *Clark v. Whitaker*, 48 Id. 160; *Scott v. Perkins*, Id. 470; *Maxwell v. Harrison*, 52 Id. 385. The doctrine of the principal case, as to what constitutes a conversion, is approved in *Morris v. Hall*, 41 Ala. 539.

AUCTIONEER RECEIVING AND SELLING STOLEN PROPERTY, WHETHER LIABLE FOR CONVERSION: See *Rogers v. Huie*, 54 Am. Dec. 300, where the court expressed a different opinion from that held in the principal case, on a former trial between the same parties.

MINTURN v. HAYS.

[2 CALIFORNIA, 590.]

NON-RESIDENTS ARE NOT EXEMPTED FROM TAXATION because section 8 of the California revenue act of 1851 provides that "every person shall be listed in the county where he resides."

LEGISLATURE HAS NO POWER TO EXEMPT FROM TAXATION ANY SPECIES OF PROPERTY, however owned, under section 13 of article 11 of the California constitution, which declares that "all property in this state shall be taxed in proportion to its value."

PROPERTY MAY BE TAXED IN ONE STATE ALTHOUGH TAXED IN ANOTHER, especially when it is within the limits of the former, and without the limits of the latter.

INJUNCTION CAN ONLY BE ISSUED UNDER REFORMED PROCEDURE where the complaint makes out a case of equity jurisdiction; the rules and principles of equity practice remain unaltered, although there is no separate forum for the adjudication of chancery cases.

EQUITY CAN NOT TAKE COGNIZANCE OF CASES INVOLVING SIMPLY QUESTION OF TAXATION; the issue is strictly one at common law.

ACTION to restrain a tax collector from levying assessments against a steamer. The allegations of the complaint are stated in the opinion. An injunction was issued, and the defendant demurred, alleging defect of parties, in that the assessor was not joined; that no cause of action was stated in the complaint;

and that the facts were not sufficient to give the court jurisdiction. The demurrer was sustained, and the plaintiffs appealed.

A. T. Wilson, for the appellants.

Thomas and Moore, for the respondent.

By Court, HEYDENFELDT, J. The plaintiffs allege that they are citizens of the state of New York; that they own the steamer *New World*, which is engaged in navigating the waters of the state of California; that they pay taxes for said steamer in New York, and therefore they say that they ought not to be taxed here, and pray that the tax collector be restrained by injunction from levying the assessments made against said steamer.

The policy and right of a sovereign state to tax property within her limits are questions so familiar that I consider it unnecessary to discuss them. And indeed, the right of the state to tax the property in question was admitted in the argument by the plaintiffs' counsel. He insists, however, that the state has not attempted to enforce that right, and that the revenue law does not provide for a case of this kind. His reasoning is founded on the eighth section of the act of 1851, which says, "every person shall be listed in the county where he resides," etc.; and therefore, because the plaintiffs are residents of no county in the state, they are unaffected by the provisions of the law.

This is certainly a singular construction, and its practical effect would be, that non-resident foreigners shall receive the protection of the state in the enjoyment of property, and in the profitable pursuits of commerce and traffic, free from any of the burdens of government; and that these shall be borne exclusively by the resident citizens of the state, who enjoy no greater benefits and receive no higher protection. To such a view I can not give my consent.

Nor do I conceive it to be within the power of the legislature to exempt any species of property, however owned, from taxation. The thirteenth section of the eleventh article of the constitution declares, "all property in this state shall be taxed in proportion to its value."

This language is explicit in prescribing the duty of our law-makers, and the law presumes that they did their duty, unless its violation is so plain and palpable as to be beyond the limits of construction.

But considering the section relied upon, with other portions of the revenue act, it is very evident that it was only intended

as a provision for the convenience of the resident tax-payers of the state, and not as an exemption from the payment of all taxes by the non-resident owners and proprietors.

By the tenth section of the same act, unoccupied land may be listed as lands of persons unknown; and the twenty-sixth section provides so particularly for the taxation of the property of non-residents, that I deem it unnecessary further to discuss the intention of the legislature.

That the plaintiffs pay taxes for the same property in the state of New York is no ground of complaint against the exercise of a legitimate act of sovereignty by the state of California. I can see no reason why the power of taxation should be conceded to the one and not to the other, especially as in the case of the one the property is without, and in the case of the other it is within, her limits.

Another question raised in the argument is as to the propriety of the remedy by injunction, to which the plaintiff has resorted. The writ of injunction belongs to the court of chancery exclusively; and although in this state there is no separate forum for the adjudication of chancery cases, yet in our courts having chancery jurisdiction, the rules and principles of equity practice remain unaltered. The writ of injunction can only be issued where the bill of complaint makes out a case of equity jurisdiction. In the case under consideration, and in all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof. The writ of injunction was therefore improperly resorted to, and should have been refused.

Let the judgment be affirmed, with costs.

ANDERSON, J., concurred.

STATE HAS POWER TO TAX PROPERTY WITHIN ITS LIMITS: *Harrison v. Mayor*, 41 Am. Dec. 633; *Battle v. Mobile*, 44 Id. 438.

STEAMBOATS MAY BE TAXED WHERE OWNERS RESIDE: *Perry v. Torrence*, 32 Am. Dec. 725; *Battle v. Mobile*, 44 Id. 438, and note.

EQUITABLE RELIEF, WHEN GRANTED UNDER REFORMED PROCEDURE: See *De Witt v. Hays*, ante, p. 352, and note. The principal case was quoted in *Loring v. Downer*, McAll. 366, as illustrating the fact that, although but one form of action is allowed in the courts of California, remedies are administered according to the rules of equity or of common law.

POWER OF COURTS OF EQUITY OVER QUESTIONS CONCERNING TAXATION: See *De Witt v. Hays*, ante, p. 352, and note. The principal case was cited in *Missouri River etc. R. R. v. Morris*, 7 Kan. 231, to the point that a court of equity ought never to interfere to set aside a tax that is merely voidable, or to restrain the collection of such tax by injunction, unless strong equitable

grounds exist for such interference; and in *Hallenbeck v. Hahn*, 2 Neb. 438, to the point that when nothing but the mere question of taxation is involved, the issue is strictly one at law, and equity can take no cognizance thereof. A party aggrieved by an illegal tax has an ample remedy at law, and equity has no authority to restrain its collection; and the unlawful collection of a tax is a mere trespass, not to be enjoined without allegations and proof of irreparable injury therefrom.

KOHLER v. SMITH.

[2 CALIFORNIA, 597.]

MONEY DEMANDS DRAW INTEREST AFTER MATURITY AT RATE EXPRESSED IN WRITTEN CONTRACT, notwithstanding nothing is expressly said about interest after maturity; and it is only where no rate is agreed upon that the statute takes effect.

ACTION by the indorsee of a promissory note, made by the defendant, for one thousand dollars, dated January 1, 1851, and payable two months after date, with interest at the rate of eight per cent. The plaintiff had written the following upon the note: "The within note is to run at the rate of five per cent. interest, in place of eight per cent. per month. Jan. 15, 1851. Henry Kohler." The plaintiff had judgment, and was charged with interest, at the rate of five per cent. per month, after the note had become due. The defendant appealed.

Field, for the appellant.

McCarty and Levezy, for the respondent.

By Court, HEYDENFELDT, J. The appellant complains that he was charged with interest upon his note at the rate of five per cent. a month after it became due; and contends that his contract was only for that rate from the time he made the note up to its maturity; the act of 1850 gives interest at the rate of ten per cent. a year for all moneys after they become due, "where there is no express contract in writing fixing a different rate of interest."

This language is very explicit, and shows that the intention of the act was twofold: first, that money demands after maturity should draw interest; and second, that they should draw interest at whatever rate was expressed in the written contract, notwithstanding that nothing is said expressly about interest after maturity. And it is only where no rate is agreed on that the statute rate takes effect. This construction is strengthened by the second section of the act, which requires judgments on such contracts to "bear the interest agreed upon by the parties."

The other point made can not properly be considered. It relates to the effect which the decision below has on the interest of a third party, who is not a party to the suit nor in any manner before the court.

The judgment is affirmed, with costs.

MURRAY, C. J., concurred.

OBLIGATION FOR PAYMENT OF MONEY BEARS INTEREST AT RATE SPECIFIED AFTER AS WELL AS BEFORE MATURITY, notwithstanding nothing is said in regard to interest after maturity. The principal case has been frequently cited to this proposition: *Etnyre v. McDaniel*, 28 Ill. 203; *Spencer v. Maxwell*, 16 Wis. 546; *McLane v. Abrams*, 2 Nev. 207; *Union Inst. for Savings v. Boston*, 129 Mass. 91; and see *Guy v. Franklin*, 5 Cal. 417; see also the note to *Selleck v. French*, 6 Am. Dec. 190, considering this and the opposite view.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

COWLES v. BACON.

[21 CONNECTICUT, 451.]

WHERE, BY REASON OF MISTAKEN OR FRUITLESS LEVY ON LAND, the debt has not in fact been satisfied, either debt on the judgment or *scire facias* may be brought to obtain satisfaction, notwithstanding the apparent satisfaction of the execution.

FACT THAT CREDITOR, WHEN HE LEVIED HIS EXECUTION ON LANDS of his debtor, had notice, from the records or otherwise, that the latter had executed a conveyance of the property levied on, but erroneously supposed that such conveyance was fraudulent and void as to him, does not release the debtor from his obligation to pay the unsatisfied balance of the debt.

OBJECT OF RECORDING CONVEYANCES IS MERELY TO GIVE NOTICE thereof, but their validity depends on other circumstances. Such records often furnish but very imperfect information of the real state of the titles.

DEFENDANT IN ACTION ON JUDGMENT MAY GIVE EVIDENCE to show that a conveyance by him of land previously levied on under the judgment was fraudulent as to the judgment creditor, for the purpose of proving that the judgment sued on has been satisfied by the levy.

PARTIES TO ACTIONS MAY NOW TESTIFY IN CIVIL SUITS like other witnesses.

COURT IS NOT BOUND TO CHARGE JURY ON ABSTRACT QUESTIONS of law arising on facts of which there is no proof in the case.

WHERE ONE BY WORDS AND ACTIONS INTENTIONALLY CAUSES ANOTHER TO BELIEVE in the existence of a certain state of things, and thereby induces him to act on that belief so as to injuriously affect his previous position, he is concluded from averring a different state of things as existing at the time.

DEBT on a judgment. The defendant pleaded the general issue, with notice of special matter to be given in evidence.

The special matter was, that Gad Cowles, the present plaintiff's testator, who was then the judgment creditor, obtained an execution on the judgment mentioned in the declaration, and had it duly levied on certain land in which the defendant held a life estate; that the right, title, and interest of the defendant therein was duly set off to and vested in said Gad Cowles, and that at the time Cowles had notice of the interest of the defendant in the premises. On the trial it was proved by the defendant and admitted, that Gad Cowles, in 1821, took out execution on the judgment sued on, and had it duly levied on the life estate above mentioned, and that all the steps required by law were taken to perfect the levy and transfer the title to the levying creditor. There was no evidence before the jury that Cowles, or any one under him, had taken or held possession after the levy. But it was proved that one Phelps, who had, under the direction of Cowles, entered and cut some grass on the premises immediately after the levy, had been sued in trespass and compelled to pay damages. After the determination of the last-named suit, and the payment of the damages recovered, Cowles ceased to set up any claim or title to the premises, but in fact abandoned them, though he did not release them. The jury found for the plaintiff, and the defendant moved for a new trial. The other facts necessary to an understanding of the questions decided are sufficiently stated in the opinion.

Hungerford and Welles, in support of the motion.

T. C. Perkins, contra.

By Court, STORRS, J. 1. The first question presented on this motion is, whether the plaintiff's testator is to be deemed to have obtained satisfaction of the judgment on which this action is brought, by the levy and set-off of land upon the execution issued on that judgment, if there was an entire failure of title in the defendant to that land, and said testator therefore got nothing by the levy and set-off.

It was anciently an established principle of the common law of England, that an extent upon the land of the defendant, returned and filed of record, is a full satisfaction and end of the suit; and therefore, that the plaintiff is not entitled to any further means of satisfaction, by writ, action, or execution. And if the tenant by *elegit* were divested of the lands so held under that writ of execution, by one having a title paramount to his own, that is, a better title than the debtor from whom he extended the lands, the rule of law, that the debt was considered

satisfied by the extent remained unchanged and unaffected by this circumstance; and the creditor could not afterwards resort to any other writ, or have any other remedy for the portion of his debt thus deemed to be satisfied. The reason upon which this principle was adopted was, that the creditor elects to hold the land for so many years till the debt be satisfied out of the rents and profits, and the judgment roll shows that it was satisfied by the *elegit*. This rule was so manifestly unjust, that in the thirty-second year of the reign of Henry VIII. a statute was enacted, for that reason expressed in its preamble, by which it was provided, that where the creditor is lawfully divested of the land so delivered to him on such extent, he may have a writ of *scire facias* against the defendant; and thereupon, if no sufficient cause, other than the acceptance of said land on the former writ of execution, is shown to bar the said suit, a new writ or writs of execution on the judgment, of the like nature and effect as the former, for the residue of the debt unsatisfied by such former execution; and the same provision is re-enacted, in similar terms, by 8 Geo. I., c. 25, under which provisions the plaintiff, on the new writ of execution, has the same privileges as on the issuing of the original *elegit*; that is, if the plaintiff can have no fruit of it, he may sue out a *scire facias* against the debtor's goods or chattels, or a *ca. sa.* to take his person in satisfaction of the debt. The courts in England, early after the first of these statutes was passed, decided that the equivalent remedy of debt on judgment would lie, if the creditor thought fit, in lieu of a writ of *scire facias*, which action of debt may now be brought on the unsatisfied judgment at any time, although further writs of execution can not be issued without a *scire facias*. See Foster on Scire Facias, 52 et seq.

In this state the ancient English common-law rule has never been adopted; but the practice has uniformly been in conformity with the principle, that where there is no real, but only an apparent, satisfaction of the execution issued on a judgment by reason of a mistaken or fruitless levy on lands, debt on judgment, as well as *scire facias*, may be brought to obtain satisfaction. The course of the authorities on this subject is given in the case of *Fish v. Sawyer*, 11 Conn. 545, in which we understand the court to approve and establish that practice, and to decide that in all cases debt on judgment lies where an execution is fruitless, by reason of a mistaken or void levy on land.

And we see no just reason for the limitation of this principle for which the defendant contends, by which it should be held,

nor to apply to cases where, as in the present, the plaintiff's testator, when he caused his execution to be levied, had notice from the records, or otherwise, that the defendant had executed a conveyance of the land levied on, but erroneously supposed that such conveyance was fraudulently made, and was therefore, as to him, void. Such a mistake constitutes no just reason why the defendant should not pay the unsatisfied balance of the debt. The former neither got, nor did the defendant lose, anything by this mistaken levy. Is the latter to go quit of his obligation when it has not been discharged by any mode known to the law, and therefore remains in full force, merely because the former has acted on a mistaken belief that the land levied on belonged to the defendant, and not to the person to whom he had ostensibly conveyed it? Or is the former to be thus punished by a forfeiture of his debt, for the benefit of his debtor, for erroneously supposing that such conveyance was actually or constructively fraudulent, and as to himself void, and for trying to avoid it? It must, indeed, be some very stubborn rule of law which would be held to produce such an unrighteous result. Nor on this point can the grounds on which the testator formed his opinion be examined for the purpose of determining whether he had reasonable cause for it; or whether such opinion was really entertained or not; because it has no bearing on this question of right and justice between these parties. It may, however, be observed, that our records of deeds often furnish to creditors of the grantors but very imperfect information of the real state of titles. They sometimes disclose the invalidity of them as to creditors when they are only constructively fraudulent, but of course they never do when they are actually so. And the object of recording conveyances is only to give notice of them; but their validity depends on other circumstances.

This action is therefore sustainable, notwithstanding this objection.

2. The next question is, whether it was competent for the defendant to show that the deed from himself to Mrs. Humphreys was given for the purpose of defrauding his creditors. If, as the plaintiff claims, it was not, the whole defense to the action fails; and therefore, a decision of the questions, afterwards made on the trial, is unnecessary. The evidence offered by the defendant was introduced, for the purpose of avoiding the effect of the conveyance from the defendant to Mrs. Humphreys, which had been produced by the plaintiff, and to show that that conveyance was executed under such circumstances that it

was void as against the plaintiff's testator; and that the latter, therefore, by virtue of his levy and set-off, on his execution, obtained full and legal satisfaction of the judgment declared on; which was the defense relied on by the defendant. This being the state of the question, as it is thus presented, it should be viewed singly, and independently of the effect of the conduct and representations of the defendant after the levy and set-off, whereby the plaintiff's testator may have been induced not to rely on those proceedings, but to treat them as ineffectual; which gives rise to a subsequent question in the case, and one to be considered hereafter.

However ungracious it may seem for the defendant thus to set up his own fraud in that conveyance, we are of opinion that, as this question was presented, he was at liberty to do so for the purpose stated. There can not be a doubt that this evidence conduced to prove that the judgment was satisfied, and was therefore in its nature relevant, for the purpose for which it was offered. It would, as a general rule, be competent for the defendant to show that he had not been, by conveyance or otherwise, divested of the estate, at the time of the levy and set-off, because their effect, in that case, would be to vest that estate in the creditor under the levy, and thus to produce a satisfaction of the judgment, which would constitute a good defense in this action. The question, then, is, whether the circumstance that the conveyance was executed by the defendant, with a fraudulent intention as to his creditors, including the plaintiff's testator, creates an exception to this rule. The effect of that fraud would be to make the conveyance voidable by those creditors at their election. If the testator chose to avoid it, as he did, by taking the land on his execution, as though the conveyance had not been made, such appropriation would clearly be a satisfaction of his debt, of which the defendant might avail himself in an action on the judgment. If it were otherwise, he might be repeatedly compelled to pay the same debt.

The question arising upon that conveyance respects only the title to the land. That is a question, not between the levying creditor and the defendant, but between the former and the grantee of the defendant. The former is neither a party nor privy, but a stranger, to the deed of conveyance; nor does he claim under it; and for that reason he is at liberty to contest it with the defendant's grantee. The defendant has no interest in that dispute, because if the creditor should not succeed in avoid-

ing the deed and recovering the land, the title would remain in such grantee, to whom the title has passed by the deed, as between him and the defendant. The attempt of the defendant, therefore, to show the deed to be fraudulent, if successful, would not defeat, but establish, the creditor's title to the land, which the defendant should plainly be allowed to do, because if that title is established, the judgment of the creditor is satisfied, and he has no legal or just claim in this action. The plaintiff objects to this proof by the defendant, on the ground that it was a violation of the legal maxim, that no one shall take advantage of his own wrong. That maxim, however, is not to be taken in an abstract, universal sense, and has no application to this question. As applicable to a case where a person undertakes to set up his own fraud, it only means that he shall not be allowed to acquire, through the medium of his deception, any right or interest against one who may be thus defrauded: Broom's Legal Maxims, 209, 215, 217. The object of the rule is to discourage dishonest practices by depriving the perpetrator of the benefit of them. But in the present case, the defendant derives no benefit nor advantage from showing the fraud which he offers to prove; on the contrary, the establishment of it would necessarily deprive himself of the benefit originally contemplated by it, and inure to the benefit of the plaintiff's testator, the person who was intended to be defrauded, by reinstating him in the condition in which he was when the fraud was attempted. To the suggestion that it is unjust in the defendant thus to attempt to defeat this suit, it is sufficient to reply, that this is begging the question; for that depends on whether he succeeds in proving that the plaintiff's claim is satisfied.

3. The further claim of the plaintiff, that it was not competent for the defendant to support this ground of his defense by his own testimony, is without foundation. By our recent statute, altering the rule of the common law in regard to the competency of parties as witnesses, and allowing them to testify in civil suits, they are placed in this respect on the same ground, and may testify as fully as disinterested persons. The defendant, therefore, became a witness generally, and, subject to the proper detraction from his credibility growing out of his situation as being interested, might testify to the facts in question like other witnesses.

4. We think that the defendant has no reason to complain of the ruling of the court below, on his claim, that the deed of January 2, 1813, was void as to the judgment debt declared on,

on the ground that it was voluntary and without consideration. Whether the deed was void on that ground would depend on facts as to the existence of which no evidence was adduced. It was proved, and not denied, that the defendant, when the deed was executed, was solvent; but there was no evidence to show whether any part of the debt embraced in the judgment was then due, or what was then the pecuniary condition of the defendant: 1 Swift's Dig. 278. The claim made on this subject was, therefore, merely abstract in its character; and the court was not bound to state the law arising on facts of which there was no proof.

5. The defendant excepts to the charge below, as to the effect of his conduct and representations to the plaintiff's testator, subsequently to the setting off of the land by the latter, on his execution. The plaintiff claimed to have proved that the defendant (provided it were true that he made the conveyances, as he claimed, for the purpose of defrauding his creditors), after the completion of the proceedings on the execution, by a course of conduct and declarations on his part, respecting those conveyances, which were calculated, and intended by him, to induce the plaintiff's testator to believe that they were made honestly, and that therefore the title of the grantees was unimpeachable and valid, had deceived and misled him, and induced him to believe that those conveyances were in fact of the character they were thus represented to be; and that, under the influence of that belief, he had been induced to give up the rights which he had acquired by virtue of his levy, and to abandon the land, and prevented from asserting or relying on his title thereto, until he had lost the title acquired under his execution. Those declarations and that conduct are detailed in the motion. There can be no doubt, and indeed it is not questioned, that they were, in their nature, calculated to induce such a belief and course of action, on the part of the testator. The jury were instructed, that if the facts were true as thus claimed by the plaintiff, the defendant was estopped from claiming that those conveyances were not good. In our opinion, that charge was clearly correct. We can not conceive of a case which more directly comes within the well-established and most just and salutary principle, that where one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing

at the time: *Brown v. Wheeler*, 17 Conn. 345, 355 [44 Am. Dec. 550]; *Roe v. Jerome*, 18 Id. 138; *Middletown Bank v. Jerome*, Id. 443. The injustice of allowing the defendant, under the circumstances of the present case, to retract or deny the truth of these representations, by which he induced the testator to believe that the conveyances in question were valid, and to treat them accordingly, is too palpable to require argument.

Our opinion is, that a new trial should not be granted.

In this opinion the other judges concurred.

New trial denied.

VACATING SATISFACTION OF JUDGMENT WHEN TITLE OF PURCHASER AT EXECUTION SALE FAILS: See note to *Jones v. Burr*, 53 Am. Dec. 701, where this subject is discussed.

LEVY, WHEN SATISFACTION: See *Mace v. Dutton*, 52 Am. Dec. 510, note 516, where other cases are collected; *Randolph v. Ringgold*, Id. 235, note 239; *Stover v. Duren*, 51 Id. 634.

ESTOPPEL BY REPRESENTATIONS, ADMISSIONS, OR GENERAL CONDUCT: See *Pierce v. Andrews*, 52 Am. Dec. 748, note 749, where other cases are collected. Where one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is precluded from averring a different state of things as existing at the time: *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 11; *Groton v. Hurlburt*, 22 Conn. 195; *Weiss v. Alling*, 34 Id. 65, all citing the principal case.

NETTLETON v. GRIDLEY.

[21 CONNECTICUT, 531.]

MERE SUBMISSION TO ARBITRATION OF PENDING ACTION does not operate as a discontinuance of the suit.

AWARD OF ARBITRATORS MADE BY LESS THAN WHOLE OF THEM is void, where there is no provision made in the submission for an award by less than the whole.

MOTION to the superior court for the discontinuance of the pending action. The parties to the action submitted the matters in controversy to three arbitrators, two of whom made an award, from which the third dissented. The defendant moved for a discontinuance. The plaintiff demurred to the motion, and the court reserved the question for the advice of this court. The other facts appear from the opinion.

Curtis and Buel, for the motion.

Seymour and Woodruff, contra.

By Court, CHURCH, C. J. This motion is predicated upon the belief that a submission of a suit or action pending in court to arbitrators, without a rule, and not followed by any valid award, operates effectually as a discontinuance of such suit.

Here was a valid submission; but the award published by the arbitrators did not carry it into effect; the award was void, not having been made with the concurring assent of all the arbitrators. There was no provision in the submission that any less number of arbitrators than the whole might make an award; and therefore, according to the doctrine of this court, as held in *Patterson v. Leavitt*, 4 Conn. 50 [10 Am. Dec. 98], the award published was of no effect. The injustice of treating this action as out of court, and while the plaintiff is deprived of the benefit of the award intended to be made, is manifest; and especially, as to do so will be also to deprive her of the securities obtained, and the costs which may be her due, in the pending action.

If the act of submission operated as a discontinuance, as the defendant insists, it would have operated just so if it had been revoked by him; for a discontinuance once effected by the submission, and the cause out of court, it could not, as we see, be again recalled, without the assent of the parties at least.

The defendant, in support of his motion, relies entirely upon the authority of some adjudged cases in the states of New York and Tennessee. No common-law authorities are referred to by the court in any of those cases, as precedents for the decisions there made; nor have we been able to find any elsewhere. We must presume that they were founded upon local rules of practice only, recognized in the judicial proceedings of those states—laws of their courts, and not upon any general principles of the common law, binding upon us. So it is in the English courts. There, a proceeding, called a discontinuance, is recognized, as a matter of practice. And this is either voluntary or involuntary. A voluntary discontinuance is like a *nol. pros.*, or what we call a withdrawal, or a non-appearance, perhaps. An involuntary discontinuance is effected in various ways: sometimes by the neglect of the proper officer of the court in not bringing forward or continuing causes from term to term; sometimes by some peculiarity in the pleadings of the plaintiffs; as if the defendant pleads in abatement, and plaintiff replies as to a plea in bar; or if there be a wrong conclusion of a prayer for judgment in a replication, etc.: *Alice v. Gale*, 10 Mod. 112; *Bisse v. Harcourt*, 1 Salk. 177; 2 Petersd. Abr., tit. Discontinuance. But this and many other peculiarities of English judicial practice

we have never adopted. And we nowhere find, even in the English books, that a bare submission to arbitration, of itself, operates as a discontinuance of an action. Such cases, however, may have escaped our research.

Nor do we recognize any principle of the common law which should give such an effect to a submission to arbitration. It is but an accord, by which a mere private power, for a private purpose, is conferred, and as yet resulting in no satisfaction or award. Judge Swift, in his Digest, vol. 1, p. 473, speaks of a submission as being a bar; but he refers to no authority for his position, and must, we think, have adopted an exception or peculiarity in the law for a general principle; as where, by the term of the contract itself, on which a suit is brought, it is provided, that in case of a difference, the dispute shall be referred to arbitrators; then, if a reference accordingly has in fact been made, it has been holden that it may be pleaded in bar of that action: *Hill v. Hollister*, 1 Wils. 129; *Kyd on Awards*, 14; *Thompson v. Charnock*, 8 T. R. 139. But beyond this, we think, it has never been supposed, that a revocable submission was a bar to an action.

The only reason which we have seen suggested why a submission alone should work a discontinuance is, that by it the parties have selected another tribunal. But this is not in analogy to well-settled rules. If a plaintiff commences a new suit for the same cause, before another court, and thus selects a different tribunal, this will not defeat the pending action, but the second action will abate. A pending submission would be a good cause for the postponement or delay of the action thus submitted; but when we see that the submission is fruitless, and may be made so by the defendant himself, as by revocation, it would be a perversion of justice to treat such submission either as a bar or a discontinuance.

We have refused to crase a cause from the docket, on motion, for extraneous causes not apparent on the record itself; but in such cases, we leave the defendant to plead them, and thus afford the adverse party an opportunity of an issue to try their materiality: *Wickwire v. The State*, 19 Conn. 477; *Lowes v. Kermode*, 8 Taunt. 146; S. C., 4 Eng. Com. L. 83.

Submission of causes in court to the decision of arbitrators has been a constant practice in this state from the earliest times; but no such application as the one now made, nor any such principle as that here claimed, has been heretofore made by or known to the profession—good evidence that the law here is

not as the defendant believes it to be. And we are not disposed now to adopt the practice claimed; and shall advise the superior court to reject the motion.

In this opinion the other judges concurred.

Motion rejected.

EFFECT ON CAUSE OF ACTION OF SUBMITTING OR AGREEING TO SUBMIT IT TO ARBITRATION.—What is the effect of the submission to arbitration of a pending cause of action, is a question upon which there is an irreconcilable conflict of authority. In several states it is held that the submission to arbitration of a pending suit operates as a discontinuance of it: *Bank of Monroe v. Widner*, 43 Am. Dec. 768, note 772; *Reeve v. Mitchell*, 15 Ill. 297; *Cunningham v. Craig*, 53 Id. 252; *Mooers v. Allen*, 35 Me. 276; *Crocker v. Buck*, 41 Id. 355; *Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 399; *People v. Onondaga Common Pleas*, 1 Wend. 314; *Larkin v. Robbins*, 2 Id. 505; *Towns v. Wilcox*, 12 Id. 503; *Green v. Patchen*, 13 Id. 294; *Buel v. Dewey*, 22 How. Pr. 342; *Jacoby v. Johnston*, 1 Hun, 242; *Baldwin v. Barrett*, 4 Id. 119; *Jewell v. Blankenship*, 10 Yerg. 439; *Rogers v. Nall*, 6 Humph. 29; *Saffle v. Cox*, 9 Id. 142; *Susong v. Jack*, 1 Heisk. 415; *McMinnville & M. R. R. v. Huggins*, 59 Tenn. 177; *Muckey v. Pierce*, 3 Wis. 307; *Bigelow v. Goss*, 5 Id. 421. While in other states it is held, as in the principal case, that a mere submission to arbitration of a pending action does not work a discontinuance of the suit: *Lary v. Goodnow*, 48 N. H. 170; *Dinsmore v. Hanson*, Id. 413; *Paulison v. Halsey*, 38 N. J. L. 488. Bellows, J., delivering the opinion of the court in *Lary v. Goodnow*, 48 N. H. 170, 173, said: "We think it very clear that a mere submission to arbitration will not be a discontinuance of a pending suit, where by express agreement or by necessary implication the cause is to be kept on foot until the arbitration has been perfected by an award. In the case before us the intention that the cause should remain is to be gathered from the agreement that judgment should be entered on the report." And at page 175 he added: "It is by no means clear, however, that a mere submission to arbitration will ordinarily work a discontinuance, or that such a position finds any countenance in the doctrines of the common law. It would certainly work great injustice in many cases by the revocation of the submission, or the death or refusal to act of the arbitrators. If a valid award is made, that might be pleaded, but it may well be doubted whether a discharge of the suit was intended until an award was made." In referring to the principal case, the learned judge said: "In Connecticut the subject was well considered in *Nettleton v. Gridley*, 21 Conn. 532, and the conclusion reached that a mere submission to arbitration is not a discontinuance of a pending suit." The case of *Lary v. Goodnow*, 48 N. H. 170, did not call for a direct determination of the question under consideration, but in the subsequent case of *Dinsmore v. Hanson*, reported in the same volume, at page 413, the question was directly involved in the decision. The same judge delivered the opinion of the court in that case, in which he said: "In New York, Maine, and Wisconsin, and perhaps in Tennessee, it has been held that a mere submission to arbitration will work a discontinuance of a pending suit, but we are not able to learn that this position finds any countenance in the doctrines of the common law."

In New York and in Illinois it has been decided that the submission of a pending cause works a discontinuance of the action, although the arbitrators

have not assumed the burden of the arbitration: *Reere v. Mitchell*, 15 Ill. 297; *Larkin v. Robbins*, 2 Wend. 505. The reason assigned for this is that the parties themselves have selected another tribunal. In Tennessee it seems that it is only in cases where it is not agreed that the award shall be made the judgment of the court that the mere submission is regarded as working a discontinuance: *Bridges v. Vick*, 2 Humph. 516; *Rogers v. Nall*, 6 Id. 29; *Crocket v. Beatty*, 7 Id. 66; *Saffle v. Cox*, 9 Id. 142; *Norwood v. Stephens*, 7 Coldw. 1; *Susong v. Jack*, 1 Heisk. 415; *McMinville & M. R. R. v. Huggins*, 59 Tenn. 177. And in *Crocket v. Beatty*, 7 Humph. 66, it was decided that it does not follow that because a cause is submitted to arbitration, without a rule of court, it is thereby discontinued; for it may be that it was stipulated that the award should be made the judgment of the court. Even in New York, where the doctrine that a general submission to arbitration works a discontinuance of a pending action seems to be most firmly established, it seems that the submission will not have that effect where the parties agree that a judgment may be entered upon the report of the arbitrators; but if in such a case the submission be revoked, the court may proceed with the trial, notwithstanding the submission: *Ex parte Wright*, 6 Cow. 399. So, too, a party may waive the discontinuance produced by the submission; and his proceeding voluntarily in the action is a waiver: *Buel v. Dewey*, 22 How. Pr. 342; *Jewell v. Blankenship*, 10 Yerg. 439. Where it appears from the submission that the parties did not intend that it should work a discontinuance of the suit, it will not have that effect: *Hearne v. Brown*, 67 Me. 156; *Jacoby v. Johnston*, 1 Hun, 242; *Ensign v. St. Louis & S. F. R. Co.*, 62 How. Pr. 123. Thus in *Jacoby v. Johnston*, *supra*, it was held that a clause in the submission "that the action in the supreme court aforesaid, and all proceedings therein or in relation thereto, shall be stayed pending the award of the arbitrators," showed an intention, on the part of the parties thereto, not to have the submission operate as an absolute discontinuance; but that it merely operated as a perpetual stay until the award was made. In the case of *Ensign v. St. Louis & S. F. R. Co.*, *supra*, the agreement to submit provided that all the suits pending between the parties should be stayed until the award was made, and then dismissed. And the language was held to indicate an intention on the part of the parties that the submission should not operate as an absolute discontinuance of the actions; that the suits were simply suspended during the time required to execute the arbitration, and when the award was made, then the actions should be dismissed. They could not regularly be moved by either party during the life-time of the submission. And in *Hearne v. Brown*, *supra*, it was held that where it is evident, from the terms of the agreement to refer, that it was the intention of the parties that the cause should remain on the docket of the court, and that the award should be returned to and made the judgment of the court, there is no discontinuance. And if in such case either of the referees declines to act, the cause will stand for trial. Even where the submission discharges the action, it does not discharge the cause of action: *Buel v. Dewey*, 22 How. Pr. 342. Nor does the discontinuance determine the validity of the award. That remains still open to attack. The plaintiff may in a proper action show that it is not binding, and therefore no bar to another suit on the same cause of action: *Cunningham v. Craig*, 53 Ill. 252.

AFTER APPEAL.—In the case of *Van Slyke v. Lettice*, 6 Hill, 610, after an appeal from the justice's court to the common pleas, the parties agreed to arbitrate, and entered into a submission which contained this clause: "All further proceedings in said suit at law are to be hereby stayed and ended."

It was held that the submission not only put an end to the appeal, but extinguished the right of suing on the original judgment. Beardsley, J., in delivering the opinion of the court in that case, said: "These parties intended to blot out and end the suit at law, from its commencement before the justice to its termination in the common pleas, by the substituted arrangement to arbitrate." See, to the same effect, *Grosvenor v. Hunt*, 11 How. Pr. 355; *Baldwin v. Barrett*, 4 Hun, 119. But in *Hayes v. Blanchard*, 4 Vt. 210, it was decided that a submission after appeal does not necessarily deprive the plaintiff of his right to enter his complaint for affirmance, unless there is an award made before court, or unless the terms of the submission allow a time in which to make an award, which extends beyond the term of the court to which the appeal is taken.

AGREEMENT TO SUBMIT TO ARBITRATION IS NO DEFENSE or legal obstacle in abatement or in bar to an action for the same cause commenced after the making of the agreement: *Smith v. Compton*, 20 Barb. 262; *Stone v. Dennis*, 3 Port. 231; *Knaus v. Jenkins*, 40 N. J. L. 288; *Rowe v. Williams*, 97 Mass. 163. A submission may be revoked at any time before the award, and a revocation may be presumed from the bringing of an action by one of the parties: *Leonard v. House*, 15 Ga. 473; *Davis v. Maxwell*, 27 Id. 368; *Peters v. Craig*, 6 Dana, 307; *Snodgrass v. Gavit*, 28 Pa. St. 221. But after a submission has been made a rule of court, it can not be revoked: *Haskell v. Whitney*, 12 Mass. 47; *Brickhouse v. Hunter*, 4 Am. Dec. 528. A revocation then would be a contempt: *Frets v. Frets*, 1 Cow. 335.

SPECIFIC PERFORMANCE OF AGREEMENT TO SUBMIT TO ARBITRATION will not be enforced by a court of equity: *Tattersall v. Groote*, 2 Bos. & Pul. 131; *Street v. Rigley*, 6 Ves. 815; *Gourlay v. Duke of Somerset*, 19 Id. 429; *Agar v. Macklew*, 2 Sim. & Stu. 418; *Copper v. Wells*, 1 N. J. Eq. 10; *Tobey v. County of Bristol*, 3 Story, 800. In the case of *Tattersall v. Groote*, 2 Bos. & Pul. 135, Lord Eldon, C. J., said: "No man, I apprehend, ever heard of a suit in equity to compel the specific performance of a covenant to refer disputes to arbitration." And Sir John Leach, V. C., in *Agar v. Macklew*, 2 Sim. & Stu. 423, said: "I consider it to be quite settled that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration." And in the case of *Tobey v. County of Bristol*, 3 Story, 819, Judge Story said: "No one can be found, as I believe, and at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way. The cases are divided into two classes: one, where an agreement to refer to arbitration has been set up as a defense to a suit at law as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defense against the suit, and have declined to enforce the latter, as ill founded in point of jurisdiction." In the same case the same distinguished jurist gives the reasons which have led courts of equity to refuse their aid to parties who seek to specifically enforce such agreements. "Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration because they wish to discourage arbitrations as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce, their awards, when fairly and lawfully made, without hesitation or question. But when they are asked to proceed further, and to compel the parties to

appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice provided by the government to protect rights and to redress wrongs."

AGREEMENT TO SUBMIT TO ARBITRATION CAN NOT OUST COURTS OF THEIR JURISDICTION, and any agreement which has that effect is invalid: *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 289, note 296, where this subject is discussed: *Haggart v. Morgan*, 55 Id. 350, note 354, and cases there collected; *White v. Middlesex R. R. Co.*, Sup. Ct. Mass., June, 1883; 29 Alb. L. J. 97; *Holmes v. Richet*, 56 Cal. 307. In speaking of the rule under consideration, Allen, J., delivering the opinion of the court in *Delaware & H. C. Co. v. Pennsylvania Coal Co.*, 50 N. Y. 259, said: "The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified. The first case in which the modern tendency here referred to made itself manifest is *Scott v. Avery*, 8 Exch. 487, and 5 H. L. Cas. 811. That was an action on policies of insurance, one of the conditions of which was that the sum to be paid for a loss should be ascertained, in the first instance, by a committee; but if a difference arose between the insured and the committee, it was to be referred to arbitration, and no one should be entitled to maintain an action at law or suit in equity on his policy until the matter had been decided by the arbitration, and then only for such sum as the arbitrators should award; and the obtaining the decision of the arbitrators was declared to be a condition precedent to the right to maintain an action or suit. The court of exchequer decided that the agreement was an attempt to oust the courts of jurisdiction, and therefore void. The court of exchequer chamber reversed that decision, and, while admitting that if the agreement had the effect to oust the courts of jurisdiction it would be void, decided that the agreement did not have that effect, and that the condition was valid, and until the award was made no action was maintainable. The case was then carried to the house of lords, where the decision of the court of exchequer chamber was affirmed. Lord Chancellor Cranworth, in delivering his opinion in the house of lords, said: "If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damages sustained by him, then, until J. S. has made his award and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting." And Lord Campbell, in his concurring opinion, said: "But what pretense can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment

upon the liberty of the subject if he were not allowed to enter into such a contract." The doctrine of this case has been approved and followed in the following cases: *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 783; 101 Eng. Com. L. 782; *Holmes v. Richct*, 56 Cal. 307; *Berry v. Carter*, 19 Kan. 135; *Delaware & H. C. Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Smith v. Boston & M. R. R.*, 36 N. H. 458.

MISCELLANEOUS.—After the submission of a cause to arbitration, and the return of the award, a party to the submission can not demand a jury trial: *Spencer v. Curtis*, 57 Ind. 221. Parties who have submitted the matters in controversy between them to arbitration, under a rule of a court of law, will not be permitted to bring them under the consideration of a court of equity: *Londonderry & E. R. Co. v. Leishman*, 12 Beav. 423. The submission of an action by a rule of court to referees operates as a waiver of all exceptions to the forms of process, or may be considered as a release of errors, or as an estoppel to an assignment of errors in the proceedings anterior to the submission: *Forseth v. Shaw*, 10 Mass. 253; *McCahan v. Reamey*, 33 Pa. St. 535. Where two parties submit mutual claims for damages to arbitrators, and they only consider the damages of one, and award him damages, but refuse to consider or hear evidence as to the claims of the other, the latter may pay the award and then maintain a suit upon his original claim: *Pritchard v. Daly*, 73 Ill. 523.

ARBITRATORS MUST UNITE IN AWARD: *Patterson v. Leavitt*, 10 Am. Dec. 98; *Green v. Miller*, 5 Id. 184; *Blin v. Hay*, 4 Id. 738; *Moore v. Ewing*, 1 Id. 195, note 200.

LAWRENCE v. KITTERIDGE.

[21 CONNECTICUT. 577.]

SUCCESSION TO AND DISTRIBUTION OF PERSONAL PROPERTY OF DECEASED PERSON are governed by the law of the country of his domicile at the time of his death. This general principle is not affected by the provision of the Connecticut statute which declares that where there are no lineal descendants of the intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." That provision was only intended to regulate the descent and distribution of the estate of the citizens of Connecticut.

COURT OF ANCILLARY ADMINISTRATION MAY RETAIN ASSETS OF ESTATE remaining after payment of all debts, and distribute them according to the law of the domicile of the intestate, or it may transmit them to the place of the principal administration, to be there distributed. The power of the court in such matter is a discretionary one, to be exercised according to the circumstances and equity of each case.

WHERE ADMINISTRATOR HAS DISCHARGED DEBT DUE FROM ESTATE of his intestate, he is entitled to have it allowed in the account of his administration.

APPEAL from two decrees of the court of probate for the district of Norfolk. The first of these decrees directed that the remainder of the estate of Cephias Pettibone, deceased, situated

in that district, after the payment of debts, should be transmitted to the administrator on the estate in the state of Vermont, there to be distributed according to the laws of that state, and not according to the laws of Connecticut. By the latter decree, in the settlement of the administration accounts, the sum of forty-one dollars and thirty-one cents was allowed against the estate. The facts are stated in the opinion.

Hall and Peet, for the appellant.

J. H. Hubbard and Peck, for the appellee.

By Court, CHURCH, C. J. The first decree of the court of probate appealed from was predicated upon facts essentially as follows, viz.: Cephas Pettibone, the intestate, at the time of his death, was an inhabitant of and had his domicile in the state of Vermont, and was possessed of an estate there; and there was due to him here, from a citizen of this state, a debt of about one thousand dollars. Original administration upon his estate was granted in the state of Vermont, and was in progress when an ancillary administration was granted in this state. When the decree appealed from was made, there were no unsatisfied debts due from the estate here or in Vermont, and nothing but a distribution of the estate remained to be done.

The intestate died, leaving brothers and sisters of the whole and half blood; all, excepting the late Augustus Pettibone, esq., of Norfolk, who was a brother of the whole blood, residing in Vermont or elsewhere out of this state; and he had no other heirs at law. By the laws of Vermont, the brothers and sisters of an intestate of the whole and half blood are entitled equally to the estate under the statute of distribution.

Upon the foregoing state of facts, the court of probate for the district of Norfolk was of opinion that the personal estate of Cephas Pettibone—the chose in action of one thousand dollars—should be distributed according to the laws of the state of Vermont; and that this could better be done, and without injury to any citizen of this state, by transmitting the money to the administrator there and to the jurisdiction of the court of principal administration, than to order a distribution of it here. And therefore the decree appealed from was made.

The appellant, who is the representative of Augustus Pettibone, the brother of the whole blood residing in the district of Norfolk, objects to this decree and appeals from it. He claims that the assets or money in the hands of the administrator here should have been distributed here, and according to the laws of

this state, which prefer a brother or sister of the whole blood to one of the half blood.

1. We had supposed that the law of the country of the domicile of an intestate governed and regulated the distribution of his personal estate; and that this was a principle of international law long ago recognized by jurists in all enlightened governments, and especially recognized by this court in the recent case of *Holcomb v. Phelps*, 16 Conn. 127, 133, in which we say that "it certainly is now a settled principle of international law that personal property shall be subject to that law which governs the person of the owner, and that the distribution of and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicile at the time of his death:" Story's Confl. L. 403, *in notis*, secs. 465, 480; 2 Kent's Com., lect. 37; 2 Kaine's Prin. Eq. 312, 826; *Potter v. Brown*, 5 East, 124; *Balfour v. Scott*, 6 Bro. P. C., Toml. ed., 550; *Bempde v. Johnstone*, 3 Ves. jun. 198; *Pepon v. Pepon*, Amb. 25, 415; *Guier v. O'Daniel*, 1 Binn. 349, *in notis*; *Harvey v. Richards*, 1 Mason, 381.

It is not necessary that we should now examine the reasons, whether of public policy or legal propriety, which have led the tribunals of civilized nations to relax from antiquated notions on this subject; some of these are well considered, by Judge Story, in the case of *Harvey v. Richards*, *supra*, and by Chancellor Kent, in his Commentaries, vol. 2, lect. 37.

It is true, that it is in the power of every sovereignty, and within the constitutional powers of the states of this Union, to repudiate this salutary doctrine, in its application to themselves, or to modify it, for what they may suppose to be the protection of their own citizens; but without some peculiar necessity, it can not be supposed that any well-regulated government will do it. It was claimed in argument, in this case, that this had been done in this state, and by the provision of the forty-ninth section of our statute for the settlement of estates, Stat. 357, by declaring that when there are no children, etc., of an intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." But it was not the purpose of this provision to disregard the universal and salutary doctrine of the law to which we have referred, but only to regulate the descent and distribution of the estate of our own citizens. This provision of our statute is not peculiar to ourselves; a similar one, we presume, may be found in the codes of other

states; at least, imperative enactments exist in every state, directing the distribution of estates; but none of them are intended to repeal the law of the domicile, in its effect upon the personal estate of the owner. The controversy, in the case of *Holcomb v. Phelps*, *supra*, arose under the same section of our law as does the one under consideration, and the result of that case must settle this question, if it be one.

There are cases in which the law of the domicile has been modified or restrained, in its full operation, for what courts have supposed to be the proper protection of the rights of the citizens of their own states; but these are generally confined to cases in which creditors are in some way interested under insolvent proceedings, assignments, or bankrupt laws, and never, we believe, are extended to mere cases of distribution, as here claimed: *Story's Conf. L.* 277, sec. 337.

The views of the court of probate in regard to the operating law of distribution, in this case, were correct; and the remaining question in this part of the case is, whether the decree which followed, directing the money in the hands of the administrator here to be transmitted to the proper jurisdiction in Vermont, for distribution, should be reversed; or whether the court here should, by its own decree, have made distribution according to the laws of Vermont.

There was but one estate to be settled; and this was, in legal view, attached to the person of the owner at the time of his death, so far as it was personal. There were two administrations: one original and principal, in Vermont; the other ancillary and subordinate, in this state: *Perkins v. Stone*, 18 Conn. 270; *Story's Conf. L.* 423.

The creditors of this estate, and all persons having claims upon it, in this state and in Vermont, were satisfied, and nothing remained to be done but in the distribution of it among those who, by the laws of the state of Vermont, were entitled to it. Why were two distributions of this one estate necessary? Without special reasons requiring a different course, there would seem to be a propriety, that the consummating act in the settlement should have been done by the tribunal exercising the principal jurisdiction, and that the money accidentally and temporarily in this state should be transmitted thither for that purpose. Otherwise, there might have been conflicting decrees, and the courts of the different jurisdictions, upon varying proofs, might have found different persons entitled to take as distributees. The law of Vermont was the governing law, and

known to the courts of that state as a matter of certainty; but here, to be ascertained only by proofs, as a matter of fact.

There are cases in which the courts of the ancillary administration have retained the assets, and distributed them according to the law of the domicile; and others, in which they have been transmitted to the principal and original jurisdiction for final action: *Harvey v. Richards*, 1 Mason, 391; *Richards v. Dutch*, 8 Mass. 506; *Daves v. Boylston*, 9 Id. 355 [6 Am. Dec. 72].

We do not think it to be a legal consequence, because distribution should be made according to the law of the domicile, that the assets should be transmitted for distribution; the courts of the ancillary jurisdiction may distribute them: *Stevens v. Gaylord*, 11 Mass. 256; *Daves v. Head et al.*, 3 Pick. 128; *Bruce v. Bruce*, 2 Bos. & Pul. 229; *Balfour v. Scott*, 6 Bro. P. C. 550; *Hog v. Lashley*, Id. 577; *Drummond v. Drummond*, Id. 601; *Somerville v. Somerville*, 5 Ves. 750.

But it seems now to be settled, that the power of the court granting the ancillary administration is a discretionary one, and should depend for its exercise upon the circumstances and equity of each case. This is a salutary principle, and can work no harm; but in its application, the citizens of the state of the ancillary administration and their rights are not alone to be regarded, but also the rights of all interested: *Harvey v. Richards*, 1 Mason, 381; *Daves v. Head*, 3 Pick. 128; *Topham v. Chapman*, 1 Mill Const. 292 [12 Am. Dec. 627]; 2 Kent's Com., lect. 37; Story's Conf. L. 424.

We see no good reason to be dissatisfied with the application of this principle and the exercise of this discretion, by the court of probate, in the decree appealed from. The original administration was granted by a court in a sister state near by, and within one or two days' reach of the appellant, who represents the only person interested in the estate here! All the other interested parties—and there were several of them—resided in the state of Vermont, or elsewhere, where they could, with equal convenience, protect their interests, and receive their portions of the distributed estate, as if the distribution had been made by the court of probate for the district of Norfolk. A greater inconvenience and expense has been avoided, by the transmission of the money to Vermont for final distribution, than if it had been retained here. And still we do not say that we would, even under the circumstances of this case, have reversed an order of distribution, if made by the court of probate here.

2. The objection to the allowance of forty-one dollars to the

administrator, for payment of a debt due from the estate to Michael F. Mills, esq., and the appeal from the order making that allowance, is frivolous. The estate owed the debt, and the administrator has satisfied it by substituting his own private responsibility, which the creditor has received as payment in full.

The superior court is advised that the orders and decrees of the court of probate should be affirmed.

In this opinion the other judges concurred—WAITE, J., with some qualifications.

Decrees affirmed.

PERSONAL PROPERTY OF DECEDENT IS DISTRIBUTED ACCORDING TO LAW OF HIS DOMICILE at the time of his death: *Atchison's Heirs v. Lindsey*, 43 Am. Dec. 153, note 158, where other cases are collected; *Goodall v. Marshall*, 35 Id. 472; *Carpenter v. Pennsylvania*, 17 How. 462, citing the principal case; *Gravillon v. Richards' Ex'r*, 33 Am. Dec. 563, note 566; *Fletcher's Adm'r v. Sanders*, 32 Id. 96.

ANCILLARY ADMINISTRATION: See note to *Goodall v. Marshall*, 35 Am. Dec. 483, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Upton v. Hubbard*, 28 Conn. 286, to the point that if a principal administrator goes to another state and there takes property or collects a debt belonging to the estate of his intestate, without having acquired any local authority, it is well enough, if no one objects; but the ordinary course is to take out ancillary administration; and in *Marcy v. Marcy*, 32 Id. 316, to the point that personal property has no *situs*, and a title to it, if good by the law of the domicile of the owner, is good everywhere.

NICHOLSON v. NEW YORK AND NEW HAVEN RAILROAD COMPANY.

[22 CONNECTICUT, 74.]

LEGISLATURE HAS POWER TO DELEGATE TO RAILROAD CORPORATION AUTHORITY TO ALTER and repair highways, subject to the liability of making compensation for the property taken or the injury occasioned thereby.

SOME DAMAGES NECESSARILY RESULT FROM EVERY WRONGFUL INVASION of another's property, and the law does not require any distinct injury to be shown, in order to justify a recovery therefor. But in the case of property of an individual included in a highway, the mere entry upon it is not an infringement of his right, unless such entry be unauthorized.

FEE OF LAND INCLUDED IN STREET REMAINS IN ORIGINAL OWNER, and the public, by establishing the highway, merely acquire a right of way over it, with the incidental right of repairing it in a reasonable manner.

WHERE CHARTER OF RAILROAD COMPANY EXPRESSLY AUTHORIZES IT TO CONSTRUCT ITS ROAD across a street, and imposes on it the burden of restoring the street to its former state, or in sufficient manner not to im-

pair its usefulness, the company is not compelled to pay damages to a person who owns a lot lying adjacent to its track, unless it has done some injury to his property in performing the work.

OWNER OF LAND USED AS STREET MAY MAINTAIN TRESPASS against a railroad company for injury caused to his property by the company's entering upon it and depositing materials thereon. So far as the company is justified in entering, in consequence of there being a highway there, it is not guilty of anything, but if it goes beyond its justification, then it is guilty of a direct trespass. If its justification fails, it is in the same condition as if it had entered upon a separate inclosure not subject to any public easement.

WHERE ERROR OF COURT IN CHARGING JURY DOES NO INJURY, it is not a ground for a new trial.

VERDICT FOR DAMAGES WILL NOT BE SET ASIDE AS EXCESSIVE, where the amount of the damages is a matter of opinion, and some of the evidence tends to show that they were estimated too high, while other evidence tends to show that they were estimated too low, if there is no evidence tending to show that the jury acted corruptly or disregarded the instructions of the court.

ACTION brought against the defendant to recover damages for injury to the plaintiff's land, which was situated on both sides of Cherry street, in the city of New Haven. The facts sufficiently appear from the opinion.

Dutton, and Kimberly and Beach, for the motion.

Baldwin and R. I. Ingersoll, contra.

By Court, HINMAN, J. The declaration contains a count in trespass, for making an embankment on the plaintiff's land, in Cherry street, in New Haven, where that street divides the land into two separate lots, one being on each side of it. The defendants' railroad is not constructed upon the plaintiff's land, but is bounded by it, where it crosses Cherry street, as far as his land extends.

The motion states that the public safety required that the railroad should pass under Cherry street; and for that purpose it was necessary that the street should be carried over it by means of a bridge, and that it should be sufficiently filled up at the point where it crosses the plaintiff's land to accommodate its grade to the height of the bridge. Such alterations of highways, where the railroad is made to cross them, are contemplated in the defendants' charter; and, as the embankment in question was made for the purpose of restoring Cherry street to its former state, "or in a sufficient manner not to impair its usefulness," it must be considered as licensed or authorized thereby. The plaintiff, however, claimed that as no damages were ap-

praised or paid to him therefor, under the charter, he was entitled to recover them in this action. And he further claimed that he was entitled to recover on the count in trespass, whether he proved any actual injury or damage, or not.

So far as this case is concerned, an examination of the latter clause of this proposition has become wholly unnecessary; because, the jury having found a substantial injury, to the extent of three thousand dollars, for which they gave the plaintiff damages, for the erection of this very embankment,—no other injury having been claimed by him—it is obvious that the claim did not apply at all to the case proved, and the defendants could not have suffered by the ruling of the judge in its favor; and so they are not entitled to a new trial here, although the case might have been different had there been a verdict for nominal damages merely. As the point, however, may frequently arise in cases of this sort, and is fairly raised upon this motion, we have determined to express our opinion upon it. Now, there is no doubt that for any wrongful invasion of another's property some damage necessarily results; and the law does not require any distinct injury to be shown in order to justify a recovery. It considers the infringement of the rights of a party an injury, for which damages must be given; because upon no other principle can one's right be protected. Every infringement of them must, to some extent, endanger the right itself, and a continuance of the infringement would, in time, deprive the party altogether of his right. If, therefore, the acts of the defendants had been committed upon property not covered by a highway, the plaintiff's claim would, without doubt, have been correct. He would have a right to protect his own exclusive possession of it; and for that purpose must, of course, have the right absolutely to exclude all others from it; and whether the acts were injurious to him or not, would not depend upon whether his property was injured, in a pecuniary point of view, no matter even if it was bettered and improved in value. Still, he would have the right to say that his close was broken, and his possession infringed upon, and for such an invasion of his right the law would give him damages.

But in regard to the plaintiff's land, included in this highway—Cherry street—he does not, we think, stand in such a relation to that that he can treat the mere entry of the defendants upon it as a breach of his close, and therefore an infringement of his right. To have that effect, the entry must be unauthorized.

We do not deny nor dispute the doctrine of the cases cited by the plaintiff in support of his claim; but we do not see that they apply to this case. No doubt he still owns the fee of this land; and the public, by establishing the highway, only acquired a right of way over it, with the incident right of repairing it in a reasonable manner. Our own case of *Chatham v. Brainerd*, 11 Conn. 60, and the cases on which it rests, decide that very fully; and if here, as in the New York cases, the defendants had laid their railroad over this land, and had laid down their timbers and rails upon it, and had thus appropriated it to their own use, we do not deny that they would be liable for such an entry. In such a case, the subjecting of the plaintiff's property to an additional servitude is an infringement of his right to it, and is therefore an injury and damage to him. It would be a taking of the property of the plaintiff without first making compensation, which the defendants' charter does not authorize; and we are not now about to say that it would be legal or constitutional if it did. But the acts complained of in this case are precisely of the same character as a portion of the defendants' acts in the case of *Bradley v. New York etc. R. R. Co.*, 21 Id. 294, which we held not to constitute a taking within the meaning of their charter or of the constitution of the state.

To return, then, to the question on which this point turns: Were the acts of the defendants authorized in the first place by their charter? and if so, then were they, by the general law of the land, illegal, notwithstanding such authority?

By the tenth section of their charter, it is provided that "whenever, for the construction of their railroad, it shall become necessary to intersect or cross any stream of water or watercourse, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same, but the said company shall restore the said stream or watercourse, or road or highway, thus intersected, to its former state, or in a sufficient manner not to impair its usefulness." This section, it must be admitted, in direct terms authorizes the construction of the railroad across this street, and it throws upon the company the burden of restoring the street to its former state, so far as not to impair its usefulness. To do that, the motion shows that it was necessary to build the bridge, and guard the street so as to make the bridge accessible; otherwise, the usefulness of the street would have been destroyed. The work was done, then, under the express authority of the legislature. Is there any restriction in the charter in regard to the work, or

any condition which must be performed before it is done? We discover none in regard to this work, if in doing it no one is injured. We have seen that by it the plaintiff's property was not taken. The defendants claimed no right to take, and did not profess to take it; they performed the work, as a burden thrown upon them, in consideration of their permission to build their road across Cherry street. That they built their railroad for their own private purposes, can make no difference with this question. Suppose the legislature had incorporated a company, with power to erect a mill, to be supported by the toll taken from its customers, and had authorized the company to cross highways with their canal or ditch, provided they restore them to their former condition, the question would be the same as here. If they take property, it must be paid for; if they injure it, this charter provides that they must pay for that; but, if they neither take nor injure it, there is not, clearly, anything in this charter that compels them to pay.

The question, then, resolves itself into a question of power in the legislature to alter the grade, or authorize a corporation or individuals to alter the grade, of a highway. But the legislature may construct and establish new highways, or it may delegate this power to subordinate bodies or corporations, as, to the county court, to towns and cities, and to turnpike companies; and, for convenience, it is generally so done. But this does not divest the legislature of its power; and if it can directly, through its own immediate agents, make new highways, this general and greater power, of course, must include the lesser power to regulate, alter, or repair them—and this power is only limited by the constitutional provision that compensation must be made for property taken for this object—as it must also for any other public object. We agree with the defendants' counsel, therefore, that the ruling and charge of the court on this point was incorrect, inasmuch as it withdrew from the consideration of the jury the question of the plaintiff's injury, and instructed them to find a verdict in his favor, whether he was injured or not; and had the verdict been such as to show that the defendants had been or might have been injured by the ruling, we should have felt bound to grant them a new trial.

We, however, have been unable to see that the defendants could have suffered at all from the ruling; and we have only examined the point, that it may be understood that we do not sanction the ruling as a correct exposition of the law. The

defendants admit, as they must, that if the plaintiff has sustained any appreciable damage, he has a right to recover for that; and it is not denied that it is proper for him to recover for it on this count. It is not necessary or very material for us to decide whether trespass or case would be the appropriate remedy, because the plaintiff has declared, as by our statute he may, in both forms for this injury. Still we do not see why trespass, with force, is not the proper remedy. We think it is; and that he can recover in that form, if he can recover at all. He owns the land, and, subject to the public easement, is in possession of it. The injury to it, by the defendant, is direct, by his entering upon it and depositing materials there. So far as he is justified in this, in consequence of there being a highway there, he is not guilty of anything; but if he goes beyond his justification, then he is guilty of a direct trespass; his justification fails; and he is in the same condition as if he had made the same entry upon any separate inclosure of the plaintiff not subject to any public easement. Hence, all the actions for such injuries have been trespass: *Chatham v. Brainerd*, 11 Conn. 60.

A new trial is asked for on the ground that the damages given were excessive, and contrary to the weight of the evidence. It is said that the jury must have disregarded the instruction of the court, "that in their estimate of damages they should allow the defendants the local, personal, and particular advantage to the plaintiff's premises occurring from the construction and use of the road." If it could be seen that this was so, then undoubtedly the defendants would be entitled to a new trial on that ground, unless, indeed, the instruction given was itself erroneous; but this is not claimed, and could not be. The rule of damages is given in the defendants' charter, and is a rational and just rule. When the damages are assessed by freeholders appointed for this purpose, in the manner prescribed by the charter, they are to inquire into the extent of them, and they are to "assess just damages to the person or persons whose real estate may be taken or injured." The language is substantially the same as is used in regard to the laying out of highways by selectmen or the county commissioners—in which case, we believe the practice is, in the assessment of damages, to consider the local and peculiar benefit that the proprietor, whose land is taken, receives by the improvement in respect to his lands not taken, but which are contiguous to the road; damages thus assessed are properly considered the only "just

damages." If this would have been the rule had the damages been assessed by freeholders, it seems to be the proper rule in a case like this. Now, damages made up in this way must of necessity be mere matter of opinion. The only precision there could be in the case was in regard to the expense the plaintiff had been at in raising his stores so as to conform to the improved grade of the street. He had expended a considerable sum for that purpose, of which he was able to show the amount. But the injury to his buildings caused by the necessity of raising them, and the peculiar benefit of the railroad to his property to be taken from the estimated and actual injury, were of course mere matters of opinion. The witnesses differed very much in regard to them. There was evidence which went to show that the damages were not estimated high enough, and there was evidence that went to show they were estimated much too high. It is not to be expected on such a subject that witnesses can agree. We probably should have estimated them less than were in fact given; but on such a subject we think, as a general thing, the finding of the jury must be final; and we see nothing in this evidence to induce us to believe that the jury have acted corruptly, or disregarded in any respect the instruction of the court.

We therefore do not advise a new trial.

In this opinion the other judges concurred, except ELLSWORTH, J., who tried the cause in the court below, and was therefore disqualified.

New trial not to be granted.

FEE IN HIGHWAY RESIDES IN OWNER OF ADJOINING LAND: See *Southerland v. Jackson*, 50 Am. Dec. 633, note 634; *Lewis v. Jones*, 44 Id. 138, note 139, where other cases are collected; *Transylvania University v. City of Lexington*, 38 Id. 173.

VERDICT, WHEN WILL NOT BE SET ASIDE AS EXCESSIVE: See *Howard v. Grover*, 48 Am. Dec. 478; *Larlet v. Forgay*, 46 Id. 554.

POWER OF LEGISLATURE TO AUTHORIZE RAILROAD IN STREET: See *Case of Philadelphia and Trenton R. R. Co.*, 36 Am. Dec. 202, note 210, where other cases are collected. To subject the owner of the soil of a highway to a further appropriation of his land to railway uses is the imposition of a new servitude upon his estate, and is an act demanding compensation awarded by law when land is taken for public uses: *Imlay v. Union Branch R. R. Co.*, 26 Conn. 259, citing the principal case. If a railroad company, in laying its track along or across a street, causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained: *Indianapolis, B. & W. R. R. Co. v. Hartley*, 67 Ill. 445, citing the principal case.

ERROR WHICH DOES NO INJURY IS NOT GROUND FOR NEW TRIAL: See

People v. Cunningham, 43 Am. Dec. 709, note 718, where other cases are collected.

BENEFITS, WHEN SET OFF AGAINST DAMAGES IN EMINENT DOMAIN PROCEEDINGS: See *Symonds v. Cincinnati*, 45 Am. Dec. 529, note 532, where this subject is discussed. The jury may, in estimating the amount to be paid by a railroad company for damage done to property by it, set off the local, personal, and particular advantages accruing to the plaintiff from the construction and use of the road: *Nichols v. Bridgeport*, 23 Conn. 201; *Trinity College v. City of Hartford*, 32 Id. 478, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 31, to the point that a city, as such, has no right in the soil of its streets; in *Elliott v. Fair Haven & W. R. R. Co.*, 32 Id. 585, to the point that where the charter of a railroad company requires it to pay all damages that shall arise to any person or persons from its construction, consequential damages may be charged against it; and in *Olmstead v. Camp*, 33 Id. 548, to the point that if a corporation takes property for a public use, it must pay for it.

WINDHAM BANK v. NORTON, CONVERSE & Co.

[22 CONNECTICUT, 213.]

AVERMENTS OF DUE PRESENTMENT OF BILL OF EXCHANGE and of notice of its non-payment are, in an action against the indorser, supported by evidence of matter of excuse or a waiver of demand and notice.

PRESENTMENT OF BILL OF EXCHANGE MUST BE MADE ON DAY on which it becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, to present it.

WANT OF PRESENTMENT OF BILL OF EXCHANGE IS EXCUSED by any inevitable or unavoidable accident not attributable to the fault of the holder, provided presentment is made by him as soon afterward as he is able.

WHERE HOLDER OF DRAFT TRANSMITS IT BY MAIL, which is the usual, legal, and proper mode, in season to reach the place where it is payable in time for presentment, by the regular course of the mail, but by the mistake of the postmaster the mail in which it is forwarded is sent beyond its destination, and not returned thereto until the second day after it is due, when the draft is duly presented, failure to make presentment on the day on which it became due will be thereby excused.

ASSUMPSIT by the Windham Bank, as holders of a bill of exchange, against the defendants, as indorsers. The bill was drawn by George Hobart of Norwich, Connecticut, upon Mansfield, Hall & Stone of Philadelphia, and by them accepted. The declaration was in the common form, and contained the usual averments of a due presentment of the bill and notice of its non-payment. The facts were found by the court, by agreement of the parties, as follows: The bill was accepted by Mansfield, Hall & Stone, "payable at the Farmers' and Mechanics' Bank" in Philadelphia. In February, 1849, the defendants had

the draft discounted by the plaintiffs, and then indorsed and delivered it to them. In the same month the plaintiffs sent it by mail to the Ohio Life and Trust Co., a banking corporation in New York, for collection, and indorsed it to their cashier, G. S. Coe. The third day of June being Sunday, the draft was actually due on Saturday, June 2, 1849. On the morning of June 1st the cashier of the Ohio Life and Trust Co. inclosed this draft with others in the proper and usual manner, addressed to the Farmers' and Mechanics' Bank, and deposited the letter containing it in the United States post-office at the city of New York, in season for the afternoon mail of that day for Philadelphia. The letter left New York in that mail and reached Philadelphia about five hours after it left New York. But as the post-office clerk at New York had by mistake marked the mail-bag in which it was contained to be forwarded to Washington, the letter was not delivered at Philadelphia, but was carried on to Washington. At Washington the mistake was discovered, and the letter was sent back to Philadelphia, where it arrived on Sunday, June 3d. On the following morning the draft reached the Farmers' and Mechanics' Bank, who by their cashier refused payment and immediately placed it in the hands of a notary for protest. The subsequent steps taken to notify the parties to the draft were all regular. Mansfield, Hall & Stone became insolvent and stopped payment on the twelfth day of April, 1849, and on the following day they notified the Farmers' and Mechanics' Bank not to pay any more notes or drafts drawn by them, as they would not be provided for. The questions of law arising on these facts were reserved for the advice of this court. The other facts appear from the opinion.

Edmund Perkins, for the plaintiffs.

Strong and Foster, for the defendants.

By Court, STORRS, J. The defendants first insist that the averments in this declaration, of a due presentment of the draft in question and notice of its non-payment, must be strictly proved, and that they are not sustained by proof of the facts set up by the plaintiffs by way of excuse. Whatever may be the course of authorities elsewhere, it is well settled here that those allegations are supported by evidence of matter of excuse, or a waiver of demand and notice. *Norton v. Lewis*, 2 Conn. 479, and *Camp v. Bates*, 11 Id. 487, are decisive on this point.

The other and more important question in this case is, whether the plaintiffs are excused for the non-presentment of this draft

for payment on the day when it became due. The last day of grace being Sunday, it was payable on the preceding Saturday, which was the second day of June, 1849. This question depends on whether the plaintiffs are chargeable with negligence in not presenting it on that day.

If the agent of the plaintiffs, to whom they sent it to be forwarded for presentment and collection, and who transacted this business for them, was guilty of such negligence, it is, of course, imputable to the plaintiffs. And it is not important to this question, either that the defendants in fact sustained no damage by the draft not having been presented for payment when it fell due, or that it would not have been paid by the acceptor if it had then been presented. The indorser, on a question of due presentment for payment, is not affected by either of these circumstances. Nor indeed do the plaintiffs claim to recover on either of these grounds.

The question of negligence here presented depends on the inquiry whether, under the circumstances of this case, the delay of the plaintiffs' agent in not forwarding this draft to Philadelphia until the last mail left New York for that place, on the day next preceding that on which the draft fell due, constituted a want of reasonable or due diligence in regard to its presentment. We say under the circumstances, because there is no positive or absolute rule of law which determines within what precise time the holder of a bill of exchange must, in all cases whatever, or at all events, avail himself of the authorized mode of transmission adopted in this instance to forward such paper for presentment. The general principle established by all the adjudged cases, as well as the approved elementary writers, is, that reasonable diligence in the presentment of a bill for payment is required of the holder, and that, therefore, if there has been no want of such diligence, he is excused: Story on Bills, c. 10; Chitty on Bills, c. 9, 10; Story on Prom. Notes, c. 7, sec. 368; *Patience v. Townley*, 2 Smith, 223, 224.

In applying this principle, the general rule is, that it must be presented for payment on the very day on which, by law, it becomes due; and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But although this is the general rule, it is not a universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence or want of reasonable diligence in not making such presentment. The whole rule, therefore, more properly stated, is, that the present-

ment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. By the very statement of this rule, as thus fully expressed, it is plain that, on the question whether the holder is excused on this ground for not thus presenting it, or in other words, whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down which shall apply under all circumstances. We have no evidence of any general custom of merchants in regard to the precise time within which mercantile paper is usually forwarded, in order to be presented for payment, so that the law merchant furnishes us no guide on this point. And it is clear that the strict rule of the common law, by which an inability to perform the terms or condition of a contract, by reason of inevitable accident or casualty, constitutes generally no excuse for their non-performance, is not applicable to mercantile instruments of this description. Therefore, the excuse for non-presentment in this case presents the ordinary question of negligence. That question may, and often does, depend on such a variety of circumstances, or those of such a peculiar character, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. But in regard to such a question, as applicable to the non-presentment of a bill or note when it is due, it is considered a well-settled rule that such want of presentment is excused by any inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment by him as soon afterward as he is able; by which is intended that class of accidents, casualties, or circumstances which render it morally or physically impossible to make such presentment. Judge Story, in speaking of this ground of excuse, says: "It has been truly observed, by a learned author," referring to Mr. Chitty, "that there is no positive authority in our law which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle which regulates all matters of presentment and notice in cases of negotiable paper. The object in all such cases is to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution, and effort." And he cites the remark of Lord Ellenborough in *Patience v. Townley*, 2 Smith, 223, 224, that due presentment

must be interpreted to mean presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within regular time: Story on Bills, sec. 258.

Applying these principles to this case, we are of opinion that the plaintiffs are not chargeable with a want of reasonable diligence.

No fault or impropriety is imputable to them by reason of their having selected the public mail as the mode of forwarding the draft in question to the bank in Philadelphia, where it was payable. It is properly conceded by the defendants, that such mode of transmission was in accordance with the general commercial usage and law in the case of paper of this description. Indeed, it is recommended in the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But, although the public mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner that they should not be chargeable with negligence or unreasonable delay. If, therefore, they put the draft into the post-office at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination in season for its presentment when due, we have no doubt that there would be, on their part, a want of reasonable diligence which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of forwarding the draft, upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable, and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law in regard to the transmission by mail of this kind of paper, and must, therefore, be supposed to require only reasonable diligence in this respect on the part of the holder; and would, indeed, be inconsistent with the rule itself, which sanctions its transmission in that manner. It has been suggested that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment at so early a period, that if by any accident it should not reach the place of its presentment, in the regular course of the mail, there should be time to recall it, and have it presented when and where it falls due; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a

demand or presentment for payment as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it, in our opinion, comport with the principle now well established, requiring only reasonable diligence on the part of the holder, or with the policy which prevails in regard to such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality; and, in the next place, it would in many cases be wholly impracticable.

The casualties incident to this mode of transmission are most various in their character, and can not, of course, be foreseen; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed by the plaintiffs in the post-office at Windham, where they were located and transacted their business, for transmission direct from thence to Philadelphia, on the very day when they became the holders of it, which was between three and four months before it became due, and by an accident or mistake of the post-master in the former place, similar to that which occurred in this case at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country (which would not have been more singular than that it should have been mistakenly mailed, as in the present case, for Washington), it might not have been practicable for the plaintiffs to learn the accident, or obviate its effect, before the paper fell due. In short, such a rule as that suggested would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested which is not equally obnoxious to the same or similar objections.

The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual, legal, and proper mode. It was deposited in the post-office in season to reach the place where it was payable, before it fell due, by the regular course of the next mail; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and but for

the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done; but was carried beyond it, in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the passage, until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was, therefore, so far as the plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs in putting the draft into the post-office at so late a period that it could not, or probably would not, reach its destination in due season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge, by the plaintiffs, for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily incident to that mode of transmission, and against which it would be extremely difficult, if not impossible, to guard. It would have been equally liable to occur at any time when the draft should have been placed in the post-office. It was not owing, in any sense, to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are, therefore, of opinion that judgment should be rendered for the plaintiffs.

In this opinion the other judges concurred.

Judgment for the plaintiffs.

WAIVER OF PRESENTMENT OF NOTE, WHAT AMOUNTS TO: See *Schmidt v. Radcliffe*, 53 Am. Dec. 678, note 680, where other cases are collected.

PRESENTMENT OF BILL, DILIGENCE REQUIRED IN MAKING: See *Orcar v. McDonald*, 52 Am. Dec. 703, note 710, where other cases are collected.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

KENT *v.* LYON.

[4 FLORIDA, 474.]

WHERE GRANTOR IN DEED FRAUDULENT AS TO CREDITORS DIES IN POSSESSION of the property granted, it is assets in the hands of his administrator, and may be levied upon as such.

WHERE FRAUDULENT DONEE GOES INTO POSSESSION OF PROPERTY in the life-time of the donor, he will not be liable therefor to the donor's representative, but he will be compelled to account therefor to the creditors.

ERROR to the circuit court of Jackson county. The opinion states the case.

Yonge, for the plaintiff in error.

Campbell, for the defendant in error.

By Court, ANDERSON, C. J. This was a case of a claim interposed under the statute, by the defendant in error, to a negro slave called Jenny, who had been levied on to satisfy an execution in favor of the plaintiff in error against George R. Williams, administrator of Jesse Lott, deceased. The cause was tried at the fall term, 1850, of the circuit court for Jackson county.

The slave was in the possession of Lott at the time of his death, and passed, with other personal property, into the hands of Williams, the administrator, and passed from him to the possession of the sheriff.

At the trial of the claim, the claimant relied upon a deed executed by Jesse Lott in his life-time, by which he had conveyed to A. M. Lott, his daughter, the negro in question, and also

upon a judgment which the claimant, in behalf of his ward, had obtained in trover against Williams for the value of the same slave.

The deed from Lott to his daughter seems to have been conceded on all hands to have been fraudulent as to creditors. At all events, there is sufficient evidence on the record to show it was so. But the defendant in error, alleging that it was good between the parties to it and their representatives, contended that therefore the property was not assets in the hands of the administrator, and as a consequence not liable to satisfy the execution.

His honor in the court below sustained this position of the defendant in error, and charged the jury as follows: "If you are of opinion that Jenny is embraced in the deed executed by Jesse Lott to his daughter, and is the one upon whom the execution in this case is levied, you will find her not subject to the execution." A verdict was rendered for the claimant, in accordance with this instruction.

The plaintiff in error excepted to the charge, and the case is thus presented to our consideration, involving this inquiry: If a donor, after having made a conveyance of his personal property, which is fraudulent as to his creditors, dies in possession of the property, and it goes into the hands of his administrator, is it assets for the payment of his debts?

There is some apparent conflict among the authorities upon this question, but we think they are easily reconciled by adverting to the principles of law which regulate and adjust the respective rights of the parties to this suit, and of the administrator of Jesse Lott.

Our statute of January 28, 1823, which is a re-enactment of the statute of 13 Elizabeth, provides that all conveyances executed with intent to delay and defraud creditors shall be "deemed, held, adjudged, and taken to be utterly void, frustrate, and of none effect," as against such creditors: Th. Dig. 215. On the other hand, the principle is clear that a fraudulent conveyance is good between the parties and their representatives: *Hawes v. Leader*, Cro. Jac. 270. In that case the intestate made a grant of his goods to B., by fraud between him and B., to cheat the creditors, and he kept possession of the goods, and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud, and the statute of 13 Elizabeth; but on demurrer, the plea was held bad, and judgment was rendered for the plaintiff, on the ground, among others, that the

deed was void only as against creditors, but that it remained good as against the party himself and his representatives.

These two principles are illustrated by the effect given to the fraudulent conveyance when tendered as evidence on the trial respectively of the two classes of conflicting claims to which we have referred.

When the contest is between a creditor and the fraudulent donee or grantee, the conveyance upon which the latter relies, if tendered as evidence, is, under the statute, "deemed, held, adjudged, and taken to be utterly void, frustrate, and of none effect," as to the creditor. The title of the donee necessarily fails, for want of evidence to support it, and the creditor prevails, after having shown pre-existing title. But where the contest is between the donee and the representatives of the donor, and the donee tenders his fraudulent conveyance, the representative is estopped from impeaching the deed of his testator or intestate—there is no party to the suit against whom the deed is "frustrate and of none effect," and the donee in his action at law must necessarily prevail.

The case now before the court is precisely the one first supposed. Kent, having obtained judgment and execution against Williams, the administrator of Lott, levies his execution upon a negro woman, of which Lott had died possessed, and which was found in the possession of the administrator. A claim is interposed, under the statute, by the guardian of the fraudulent donee, and to support this claim he relies mainly upon the fraudulent conveyance from Lott to his daughter. The statute having declared in effect that this deed, as against Kent, should be adjudged utterly void, the court erred in instructing the jury that it was conclusive evidence of Anna Maria Lott's title. In regard to Kent's claim, it was a nullity, and it should have been so adjudged.

It will be found, we think, that the point decided in every case referred to in the argument turns upon the distinction we have here made as to the effect of the fraudulent conveyance when tendered as evidence in the two classes of controversies.

Before we proceed to the examination of the several cases, we will advert to one of the general rules deduced from them, as a further illustration of our meaning.

The fraudulent donee who goes into possession during the life-time of the donor, when he attempts to repel the effect of this evidence by the exhibition of his fraudulent deed, is at once arrested by the exclusion of this deed as being a nullity

in regard to the party with whom he is contending. He is without evidence of his authority to intermeddle with the goods of the intestate, and necessarily becomes liable as executor of his own wrong.

The case of *Backhouse v. Jett*, 1 Brock. 500, was that of a gift of slaves and other property by a father to a son, consummated by delivery in the life-time of the father. Chief Justice Marshall, on a bill filed by the creditors of the father against the donee, decided that the slaves were not assets in the hands of the administrator, but that the donee was responsible for their value to the creditors. These conclusions are in consistency with the rule we have laid down and other well-settled principles. The property fraudulently conveyed was not assets, because, having passed out of the possession of the donor in his life-time, his administrator, as such, could not be charged by the creditors—having no possession himself as administrator, and being debarred by the policy of the law from acquiring possession by impeaching the deed of his intestate. These general conclusions were not affected by the accidental circumstance that in this case the donee and the administrator were the same person. The property was not held to be assets, but the defendant, as fraudulent donee, was held to account to the creditors for its value.

The case of *Osborne v. Moss*, 7 Johns. 161 [5 Am. Dec. 252], is a mere affirmation of the point settled in the case of *Hawes v. Leader*, already referred to. The principle decided is, that a grantee under a deed, fraudulent as to creditors, may nevertheless recover of the administrator of the grantor, and it is in obvious consistency with the rule. The case of *Ralls v. Graham*, 4 T. B. Mon. 120, is a reiteration of the principle already quoted from 2 Saunders, and approved in *Backhouse v. Jett*, to wit, that a fraudulent grantee is responsible to creditors as executor *de son tort*, for what he received in the life-time of the donor.

The case of *Bethel v. Stanhope*, Cro. Eliz. 810, was that of a suit by a creditor against an executor *de son tort* who pleaded no assets. It was found, upon special verdict, that the testator was possessed of divers goods, and by covin, to defraud his creditors, made a gift of them to his daughter, with a condition that, upon the payment of twenty pounds, it should be void, and died. The defendant intermeddled with the goods, and afterwards the daughter, by this gift, took the goods, and after that, administration was committed to the defendant.

The question was, whether these goods should be assets in his hands. It was adjudged that they were, as he had intermeddled with them after the death of the intestate; but it was remarked by the court that if the goods had been taken in the life-time of the intestate, they would not be assets until recovered.

The case of *Shears v. Rogers*, 3 Barn. & Adol. 362, fully establishes all the conclusions at which we have arrived from a consideration of the general principles involved in this case. It was an action of debt against an executor, on bond given to plaintiff by John Morgan, deceased. Plea, *plene administravit præter* certain goods; replication, assets *ultra*, upon which issue was joined. The evidence showed a fraudulent conveyance by the testator of certain household property, he continuing in possession until his death. After his death the executor took possession.

It will be perceived that this case, in all its essential parts, is precisely the same as the one before the court. There was judgment for the plaintiff, and several of the justices delivered opinions.

Lord Tenterden, C. J., said: "The authorities show that whenever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claim of the creditors, and the goods are assets in the hands of his executor. It is impossible to say here that the lease was not assets, for the defendant had it in his possession."

Littledale, J., said: "I am of opinion the lease was assets. The assignment was void as soon as the creditors claimed to treat it as such, though not until then."

Taunton, J., after referring to the insolvent circumstances of the testator, says: "The assignment is utterly void and frustrate against creditors, and the case is to be considered as if it had never been executed. The intestate therefore died possessed of the lease, and it was assets in the hands of the executor."

Patterson, J., concurring in the opinion of the other justices, says: "As the statute says that the fraudulent deed shall be utterly void and frustrate, and as the lease was in the hands of the testator at the time of his death, it passed to the executor, and was assets in his hands."

The judgment here made and the opinion of the several judges completely cover every point in the case now under consideration.

The rights of creditors are fully asserted in this decision,

more clearly and perhaps more broadly than in some of the older cases to which we have referred, but not more so, we think, than a consistent and salutary construction of the statute requires. We conclude, then, in reference to the case before us, and in language warranted by the opinions just quoted, that because the deed from Lott to his daughter was fraudulent and void as against creditors, the slave Jenny remained the property of Lott, so far as Lott's creditors were concerned, and was clearly assets in the hands of the administrator, and that the deed of gift is to be considered, in reference to creditors, as if it had never been executed.

The first error assigned is therefore sustained. The second error assigned is, that the court erred in charging that the judgment in the case of *R. F. Lyon, Guardian of A. M. Lott, v. George R. Williams* [action of trover], the record of which suit is in evidence, showed that Jenny was not assets, and was such estoppel as would compel the defendant in this suit and plaintiff in *fieri facias* to pursue the property in other modes.

This assignment is therefore sustained. The judgment in this case will be set aside, and the case remanded to the court below, a *venire de novo* awarded, and on the trial of the right of property, the jury will be instructed in accordance with the foregoing opinion.

RIGHT OF PERSONAL REPRESENTATIVE TO ATTACK SALES IN FRAUD OF CREDITORS: See *Babcock v. Booth*, 38 Am. Dec. 578, note 583, where other cases are collected.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

COOK v. STATE.

[11 GEORGIA, 53.]

INDICTMENT CHARGING OFFENSE IN LANGUAGE OF CODE creating it, or so plainly and distinctly that the jury can clearly understand its nature, is sufficient.

INDICTMENT FOR INCESTUOUS ADULTERY BY FATHER WITH DAUGHTER, averring that on certain days the defendant, being a married man, did commit divers acts of incestuous adultery by cohabiting and having sexual intercourse with one L. C., etc., she, the said L. C., being then and there the daughter of him, etc., without stating that the said L. C. was his legitimate daughter of the whole blood by her mother, to whom he was legally married, is good.

ADULTERY MAY BE COMMITTED BY MARRIED MAN WITH UNMARRIED WOMAN; so incestuous adultery, but the woman in such a case is guilty only of incestuous fornication.

INDICTMENT CHARGING OFFENSE ON CERTAIN DAY AND DIVERS OTHER DAYS, etc., is good, the latter words being surplusage.

INDICTMENT MAY CHARGE OFFENSE ON ANY DAY PRIOR to the finding thereof, and the crime may be proved on any day within the statute of limitations.

REMARK BY JUDGE THAT HE WILL GIVE STATE BENEFIT OF DOUBTS in passing on a motion to quash an indictment, where he says he has doubts, on the ground that the state has no appeal, is not error, nor is it a censurable irregularity.

CONFESSIONS FREELY AND SOLEMNLY MADE are the highest evidence, as a general rule, and exceptions to the rule should not be allowed except on unassailable grounds.

DEFENDANT'S ADMISSIONS ARE COMPETENT EVIDENCE OF MARRIAGE and of relationship to the female *particeps criminis*, under an indictment for incestuous adultery.

INDICTMENT for incestuous adultery with Lucinda Cook, the defendant's daughter. The substance of the indictment is stated in the opinion. Motion to quash the indictment overruled, and defendant, being convicted, brought error. The errors assigned appear from the opinion.

A. Morton, for the plaintiff in error.

Williams, solicitor general, for the defendant in error.

By Court, NISBET, J. The indictment in this case was sought to be quashed, upon the ground "that it does not aver that Lucinda Cook was the legitimate daughter, of the whole blood, of the defendant, by her mother, to whom he was legally married." The motion to quash was, as we believe, properly overruled by the presiding judge. The rule of this court, as to setting out the offense, is well settled: it is the rule which the legislature has prescribed. If the indictment charges the offense in the language of the code creating it, or so plainly and distinctly that the jury can clearly understand its nature, we hold it sufficient. The offense charged in this indictment is incestuous adultery. The penal code simply declares that if any person shall commit incestuous fornication or adultery, such person so offending shall, on conviction, be punished by imprisonment and labor, etc. The indictment avers that the defendant, being a married man, did, on the first day of May, 1851, and on divers other days, before and after that day, commit divers acts of incestuous adultery, by cohabiting and having sexual intercourse with one Lucinda Cook, an unmarried woman—she, the said Lucinda Cook, being then and there the daughter of him, the said George W. Cook—contrary to the laws, etc. I do not see but that this description of the offense is quite sufficient to enable the jury to understand the nature of it. They, as sensible, although unprofessional, men, could not fail to see that they were impaneled to try George W. Cook for the offense of incestuous adultery. They could not mistake it for any other offense. The charges are that he was, on a day named, guilty, not of adultery, but of incestuous adultery, by having sexual intercourse with Lucinda Cook, being then and there his own daughter; and that he was a married man.

What constitutes the crime of incestuous adultery? What are its elements? Marriage of the defendant, the fact of sexual intercourse, and the relation of the parties within the Levitical degrees: all of which are averred, and so plainly as to be issuable—so plainly that the jury are obliged to understand that

they are to find all the issues against the defendant before they can find him guilty.

Another exception to the indictment was, that the facts charged make a case of incestuous fornication, and no conviction, therefore, could be had on it for incestuous adultery. Here the defendant is charged to be a married man, and the woman an unmarried female. The exception goes upon the idea that the crime of adultery is not complete unless both parties are married. Such is not the law. If both are married, the connection would be adulterous as to both. Since one is married, in this case, to wit, the defendant, his crime is incestuous adultery. The woman being unmarried, her crime is incestuous fornication: *Respublica v. Roberts*, 1 Yeates, 6; S. C., 2 Dall. 124.

Again, the indictment was sought to be quashed, on the ground that it does not charge the offense to have been committed on a particular day. It is, no doubt, claimed to be uncertain, because, after charging the offense to have been committed on a day certain, to wit, the first day of May, 1851, it proceeds to say, "and on divers other days and times, before and after that day." These words may be rejected as surplusage, a day certain having been charged: See *United States v. La Coste*, 2 Mason, 140; 1 Stark. Crim. Pl. 235; *Rex v. Redman*, 1 Leach's C. C. 477; *Rex v. Sadi*, Id. 468. Rejecting them, time is averred with sufficient certainty.

Any day previous to the finding of the indictment will do, except when time enters into the nature of the offense; and the offense may be proven on any day, within the period of limitations, dating back from the finding of the bill: *McLane v. State*, 4 Ga. 341; 1 Ch. Crim. L. 224, 225; *Shelton v. State*, 1 Stew. & P. 208; *State v. G. S.*, 1 Tyler, 295 [4 Am. Dec. 724].

When the presiding judge determined upon these motions to quash the indictment, he remarked that he had doubts about the law, and having such doubts, he would give the state the benefit of them; because the state was not allowed to carry the case to the supreme court. Counsel for the defendant below have brought this remark here as error. This remark is no ruling; it is the expression of a reason for ruling as he did against the plaintiff in error. We are not disposed to treat it as an irregularity to be censured, much less as an error to be corrected. It is to be feared, in these days of reform, that the judges will be so strictly laced as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself as to endanger any of the powers

of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the jury of their appropriate functions. The danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law. I am not, therefore, disposed to watch with great vigilance every act, phrase, or sentiment that may fall from the court, with the hope of detecting an indiscretion, or fabricating an error. Surely some discretion ought to be allowed to able, painstaking, conscientious men, as to the mere etiquette of judicial procedure. We are not inclined to regard this as an indiscretion, even, of which the plaintiff in error has any right to complain; because, instead of prejudicing his rights before the jury, it would seem rather to be calculated to incline them towards acquittal; that is to say, if such a remark, made in the hearing of the jury, could have any effect at all, upon the mind of a conscientious juror, which I seriously question, it would incline him, if he was not fully satisfied of his guilt, to acquit one against whom the law had been ruled thus doubtfully.

But what principle is violated in the remark? The reason given, for affording to the state the benefit of the judge's doubts, is a true one. The state, in criminal cases, can not take the cause up; the defendant can. It was said in the argument, that the great and humane principle of the common law, that if there is reasonable doubt as to guilt the prisoner shall be acquitted, was violated. We recognize this just and benevolent rule of conduct as applicable to jurors, when called upon to pronounce upon guilt or innocence. Nay, more: we hold that no just judge will or ought to be permitted to rule a principle of law against any man, either in criminal or civil causes, against his paramount convictions. A judge who would do this is worthy of impeachment. But a judge may doubt, whilst he gives judgment, with a preponderance of intellectual evidence in favor of his decision. Perfect assurance that he is right can not always be had. Decide the law he must—he has no volition in the matter. With doubt or without doubt, it is his duty to decide every question of law which properly arises in a cause; and if he decides honestly, with the best energy of his intellect—with the best industry of his circumstances, and the best lights of his conscience—he is amenable to no tribunal, human or divine, for the error of his judgment. Is it expected that judges are always to decide without doubt? If it is, it is a vain

expectation. There are times when the ablest doubt, and good men and able judges doubt oftener than the weak and unconscientious. "Fools rush in where angels fear to tread." One of the ablest, most conscientious, and most renowned of English chancellors, Lord Eldon, was called the doubting judge; yet a great living jurist has said of him, that his mind was never perplexed but by the fear of doing injustice. And is it to be conceded that in criminal cases a judge must decide in favor of the prisoner in all cases where he has doubts? I know of no such rule of judicial conduct. He ought not to decide in any case but according to his convictions. If he has no doubts, very well. If he has doubts, but his convictions, notwithstanding, are against the prisoner, let him decide according to his convictions. Such we consider to have been the position of Judge Iverson in this case.

We have no right to conclude that the weight of his convictions was in favor of the prisoner, and that, notwithstanding this, he decided against him because he could take the case up, and the state could not. We dare not presume such official depravity. The record warrants no such presumption; nor does anything in the personal or official character of the man warrant it. The record and all other things warrant this, to wit, that his convictions as to the law were against the prisoner, but that he was not so clear as to be without doubt; and in such a state of the matter, he would give to the state the benefit of his doubt. And in all this we find nothing wrong: *Breedlove v. Turner*, 9 Mart. 355; *Ayliffe's Pand.* 62, t. 17; *Co. Lit.* 294; 2 Inst. 422; *Ross v. Rittenhouse*, 2 Dall. 160; S. C., 1 Yeates, 443; *Reid v. Hood*, 2 Nott & M. 168 [10 Am. Dec. 582]; *Yates v. Lansing*, 5 Johns. 296.

The court admitted the admissions of the defendant that the girl with whom he had the incestuous connection was his daughter, and that her mother was his lawful wife. The admission of this evidence is excepted to. This question is not without difficulty. It may be considered doubtful, both upon principle and authority. Acknowledgments, cohabitation, and repute, etc., in ordinary civil cases, prove marriage; but it is said, in criminal cases—as in prosecutions for bigamy and adultery—a marriage in fact must be proved. Upon like principles, it is insisted that in this case—a prosecution for incestuous adultery—a marriage in fact must be proven; and that the admissions of the defendant are not competent. As a general rule, the confessions of a party, freely and solemnly made,

are the highest evidence. So reasonable and well settled is this rule, that exceptions to it, to be sustained, ought to rest upon the most unassailable grounds. It is argued that a man ought not to be convicted upon confessions of a fact which he may have been induced to make contrary to the truth with the view of protecting himself from a criminal prosecution. That is, in this case, the admissions of the defendant that he was married may have been made with a view to prevent a prosecution for living in a state of adultery with his alleged wife, and therefore ought not to be admitted. If the admissions of this defendant were made after his connection with his daughter, he must be presumed to have made them with a knowledge of the fact that he was liable to prosecution for incestuous adultery, and also with a knowledge that upon the trial of such a prosecution it would be necessary to prove his marriage. In that event, his admissions are to be taken to be true, because made against his interest. If made before such connection, it can only be presumed that he made them contrary to the truth, in order to shield himself from a prosecution for adultery, upon the assumption that he was, in fact, living in a state of adultery. Such assumption a court has no right to make. He is, I think, rather to be presumed to have spoken truly; and upon his trial, if he spoke under a misapprehension, and was not lawfully married, he might defend by showing that fact. Upon principle, we see no reason why this evidence should not go to the jury, to be weighed by them, and respected in their verdict for what it is worth, under all the circumstances of the case.

But one case was read directly applicable to the facts of this case. No more could be found; because crimes of such revolting atrocity as incestuous adultery, to the credit of humanity, are exceedingly rare. The principle upon which the admissions are claimed to be excluded is drawn mainly from the analogous cases of bigamy, adultery, and *crim. con.* The first and the main English authority which seems to sustain the plaintiff in error is *Morris v. Miller*, 4 Burr. 2057. This was a case of *crim. con.*, and the evidence relied upon to show the marriage of the plaintiff was articles entered into after marriage to settle the wife's estate, cohabitation, bearing the name of the plaintiff, and reception of the woman by everybody as the wife of the plaintiff. Lord Mansfield held it insufficient, saying: "We are all clearly of opinion that in this kind of action—an action for criminal conversation with the plaintiff's wife—there must be evidence of marriage in fact; acknowledgment, cohabitation, and reputa-

tion are not sufficient to maintain this action." He put his ruling upon two grounds: 1. Because *crim. con.* is a "sort of criminal action;" and, 2. Because "it could not depend upon the mere reputation of marriage, which arises from the conduct or declarations of the plaintiff himself." It is true that his lordship also said that in prosecutions for bigamy a marriage in fact must be proved. Now it is clear that the rule laid down as applicable to actions of *crim. con.* is right. The plaintiff shall not be permitted to make evidence for himself. Lord Mansfield would not permit him to do this, in *Morris v. Miller*, and that is the extent to which the judgment goes in that case. The other case relied upon in England is *Birt v. Barlow*, 1 Doug. 170, which was also a case of *crim. con.*, and ruled by Lord Mansfield in the same way and for the same reasons. Now, do not these cases stand upon different principles from the case at this bar? There the plaintiff's acts and admissions in his own favor, to make out his own case, were excluded; but here, it is the admissions of the defendant, made against his interest, and sought to be used by his adversary, the state, that we are asked to reject. They certainly do. The American cases are sustained upon the authority of these two English cases, and I believe none other from that quarter. At the same time, I concede that according to the *obiter* of Lord Mansfield, in criminal prosecutions, a marriage in fact must be proven.

In relation to the case of *Morris v. Miller*, it is further to be remarked, that the admissions of the defendant as to the fact of the plaintiff's marriage were not ruled out. There were in that case some admissions by the defendant. He being surprised at a lodging with the plaintiff's wife, and asked where Major Morris' wife was, replied: "In the next room." This was holden insufficient, because it was only a confession of the reputation of the marriage: See Bull. N. P. 28. In the case of *Rigg v. Curgencen*, 2 Wils. 399, where the case of *Morris v. Miller* was cited and considered, the court say: "To be sure, the defendant saying in jest or in loose, rambling talk that he had lain with the plaintiff's wife would not be sufficient alone to convict him in that action (*crim. con.*); but if it were proved that the defendant had seriously or solemnly recognized that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to the jury, without proving the marriage." So an admission on the record, in a previous judicial proceeding, of the validity of a first marriage was admitted against the defendant, in a prosecution for big-

amy: 1 East P. C. 470-472; 2 Ch. Crim. L. 472, notes. Chitty, in a note to the title "Indictments for Bigamy or Polygamy," says: "Any evidence seems to be sufficient which will convince the jury that an actual marriage was completed." 2 Ch. Crim. L. 472, note. Phillips, commenting upon the case of *Morris v. Miller*, writes: "This decision does not warrant the conclusion that a distinct and full acknowledgment of the marriage, made by the defendant himself, will not be evidence of the fact as against him, and sufficient to dispense with the more formal and strict proof of marriage." 2 Phill. Ev. 210, 211. In the case of *Regina v. Upton*, 1 Car. & K. 165, note, being an indictment for polygamy or adultery, the prisoner's deliberate declaration that he was married to the alleged wife was held sufficient evidence of marriage. From this notice of the English decisions, it does not seem to us that the common law, as we adopted it, contains a settled rule that, in prosecutions for bigamy or adultery, the admissions of the defendant as to the fact of marriage shall be excluded. We are not, therefore, required by the common law to adopt such a rule in the courts of Georgia. We are at liberty to settle it here, there being no legislation upon the subject, according to our own views of principle and policy. If we seek counsel from the American books, we find them contradictory. In Massachusetts it would seem that the courts are disposed to exclude all evidence of marriage but the highest: *Commonwealth v. Norcross*, 9 Mass. 492, and *Commonwealth v. Littlejohn*, 15 Id. 163. In New York it has been held that, in prosecutions for bigamy, the confessions of the party are not sufficient, but a marriage in fact must be proved: *Fenton v. Reed*, 4 Johns. 52 [4 Am. Dec. 244]; *People v. Humphrey*, 7 Id. 314. So, also, in Connecticut: See *The State v. Roswell*, 6 Conn. 446; see also *Kirby v. Rucker*, 1 A. K. Marsh. 391. In Pennsylvania the contrary rule obtains: *Forney v. Hallacher*, 8 Serg. & R. 159 [11 Am. Dec. 590]; see also *Cayford's Case*, 7 Greenl. 57; *Commonwealth v. Murtagh*, 1 Ashm. 272; *Ham's Case*, 11 Me. 391.

Marriage, by the common law, entered into by persons competent to contract it, is valid, if the contract be made *per verba de presenti*, without cohabitation, or if made *per verba de futuro*, and be followed by consummation. This doctrine of the common law obtains generally in the states, unless altered by the statute. There is nothing in our statutes which repeals it. No form is prescribed for solemnizing marriage—no form of proof is required. Penalties are prescribed against persons

who shall perform the ceremony without a license or publication of banns, to which they would be answerable; but upon common-law principles, such marriage would not be void for want of license or publication of banns in Georgia. It is manifest, then, that if marriage in fact must be proved, and contract alone is necessary to make a valid marriage, the contract must be proved. In cases (and they are most numerous) where the contract is not in writing, the marriage, if confessions are excluded, could be proved only by witnesses; and if a marriage in fact, in criminal prosecutions, must be proved by the production of witnesses, the result would be that many cases, where proof of marriage is necessary to conviction, could not be made out. The witnesses could not be produced. They die, or in this wandering, unsettled age and country are soon scattered to the inaccessible ends of the earth. These considerations demonstrate the policy, in our country, of the rule which we have adopted.

Let the judgment be affirmed.

INDICTMENT FOLLOWING WORDS OF STATUTE CREATING OFFENSE IS GOOD: *Simmons v. State*, 49 Am. Dec. 131; *State v. Smart*, 55 Id. 683, and notes thereto. See also *Hess v. State*, 22 Id. 767; *People v. Enoch*, 27 Id. 197.

WHETHER ADULTERY CAN BE COMMITTED BY MARRIED MAN WITH UNMARRIED WOMAN, see *Commonwealth v. Call*, 32 Am. Dec. 284, and note discussing the subject of adultery; *State v. Lash*, Id. 397; *Hunter v. United States*, 39 Id. 277.

INDICTMENT MUST ALLEGE DAY CERTAIN on which offense committed: *State v. Roach*, 2 Am. Dec. 626; *State v. G. S.*, 4 Id. 724; *State v. Sexton*, 14 Id. 584; *State v. Orrell*, 17 Id. 563; *State v. Beckwith*, 18 Id. 46; *Mau-zau-mau-ne-kah v. United States*, 39 Id. 279. But the proof need not be confined to the day named: *State v. G. S.*, 4 Id. 724; *State v. Orrell*, 17 Id. 563. The offense may be proved to have been committed on any day prior to the finding of the indictment within the period prescribed by the statute of limitations within which the indictment must be found: *McBryle v. State*, 34 Ga. 204; *Maher v. State*, 53 Id. 450; *Jackson v. State*, 61 Id. 347, all citing the principal case.

ALLEGATION THAT AT "DIVERS OTHER DAYS," etc., like offenses were committed, in an indictment for misdemeanor, may be rejected as surplusage: *Gallagher v. State*, 26 Wis. 425, citing *Cook v. State*, and other cases.

CONFESSIONS AS EVIDENCE, admissibility and effect of, generally: See *Bower v. State*, 32 Am. Dec. 325; *State v. Soper*, 33 Id. 665; *State v. Phelps*, 34 Id. 672; *Findley v. State*, 36 Id. 557; *Matchin v. Matchin*, 47 Id. 466, and notes.

ADMISSIONS OF DEFENDANT ARE COMPETENT EVIDENCE OF MARRIAGE under an indictment for adultery or bigamy: *Cameron v. State*, 48 Am. Dec. 115; *Wolverton v. State*, 47 Id. 373, and notes. The principal case is cited to the same point in *Murphy v. State*, 50 Ga. 150, 151, where it is held that under an indictment for bigamy, proof of a prior marriage by a witness present

at the ceremony, without the production of the marriage license and return, is sufficient.

PROOF OF MARRIAGE IN CRIMINAL CASES GENERALLY: See the notes to *State v. Hodyskins*, 36 Am. Dec. 745, and *Cameron v. State*, 48 Id. 115, where the subject is discussed at length.

INSTRUCTION THAT JURY ARE JUDGES OF LAW, AND IF THEY HAVE ANY DOUBT as to the law in a criminal case they must acquit, may be properly refused, such a doctrine being at variance with that laid down in the principal case: *O'Neil v. State*, 48 Ga. 78.

REFERENCE TO REVISORY POWERS OF APPELLATE COURT in the charge of the court below in a criminal case is held, in *Hayes v. State*, 58 Ga. 46, to be improper, even if it is not error, and the principal case is cited.

PETTS v. ISON.

[11 GEORGIA, 151.]

DEATH OF DEFENDANT ABATES ACTION OF TRESPASS for a direct and immediate injury to a chattel, and the action can not be revived against his personal representative.

SCIRE FACIAS requiring Hannah Ison, executrix of John Ison, to appear and show cause why she should not be made defendant in a certain action described in the opinion pending against her testator on appeal at the time of his death. *Scire facias* dismissed and the action ordered to abate. The plaintiffs accepted.

W. W. Arnold, for the plaintiffs in error.

H. Green, for the defendant in error.

By Court, WARNER, J. The only question made by the record for our judgment in this case is, whether the cause of action survived against the executrix of the testator, or whether it abated by his death. The plaintiffs in the court below brought an action of trespass against John Ison, the testator, and while the action was pending on the appeal, the defendant died. The declaration alleges that the defendant with force and arms assaulted the plaintiffs' wagon-driver, stopped their team with great force and violence, and with axes, sticks, etc., knocked, hewed, and cut all the spokes out of one of the wheels of the plaintiffs' wagon, to their great damage, etc. By the twelfth section of the judiciary act of 1799 it is declared: "No suit in any of the said courts shall abate by the death of either party, where such cause of action would, in any case, survive to the executor or administrator, whether such cause of action would survive in the same or in any other form, but the same

shall proceed as if such testator or intestate had not died," etc.: Prince, 422.

The legislature evidently had in view the common law, at the time of the enactment of this statute. The mere form of the action, however, was not intended to be the criterion for its survivorship or abatement. The rule of the common law, as stated by Blackstone, is that in all personal actions arising *ex delicto*, for wrongs actually done or committed by the defendant—as trespass, battery, and slander—that *actio personalis moritur cum persona*, and can not be revived either by or against their representatives: 3 Bla. Com. 302. Mr. Chitty states the rule to be, at common law, that in cases of injuries to personal property, if either party died, in general no action could be supported, either by or against the personal representatives of the parties, where the action must have been in form, *ex delicto*, and the plea not guilty; but if any contract could be implied—as if the wrong-doer converted the property into money, or if the goods remain in specie, in the hands of the executor of the wrong-doer—*assumpsit* for money had and received may be supported by or against the executor in the former case, and trover in the latter: 1 Ch. Pl., Dunlap's ed., marg. p. 57. According to Mr. Chitty, the statute of 4 Edw. III. has not altered the common-law rule in its relation to personal property only in favor of the personal representatives of the party injured: 1 Ch. Pl., marg. p. 56. This is an action of trespass against the defendant, for a direct and immediate injury to the property of the plaintiffs. The defendant nor his estate was not benefited by this tortious act; and in such cases, the rule of the common law, *actio personalis moritur cum persona*, applies: *Gravath v. Plympton*, 13 Mass. 454; *Wheatley v. Lane*, 1 Saund. 216, note 1; *Franklin v. Low*, 1 Johns. 401. This action of trespass would not survive at common law, and we are unable to perceive that it would survive in any other form of action. The law, very clearly, would not raise an *assumpsit* upon an implied contract in favor of the plaintiffs; and the injury having been direct, and committed with force, an action on the case could not be maintained, nor would trover lie. The result, therefore, is that the plaintiffs' cause of action against the defendant abated on the death of the latter, and can not be revived against his legal representatives.

Let the judgment of the court below be affirmed.

Am. Dec. 115; *Owing's Case*, 17 Id. 311; *Haven v. Brown*, 22 Id. 208; *Coombs v. Jordan*, Id. 236; *May v. State Bank*, 40 Id. 726; *Reid v. Strider*, 54 Id. 120. In *Thompson v. Central Railroad*, 60 Ga. 122, which was an action for a personal injury, the plaintiff prevailed in the court below, and the judge ordered a new trial, upon which the plaintiff brought error, and died while the cause was pending in the appellate court. Upon this state of facts, Jackson, J., was of the opinion, citing the principal case, that the cause was abated *instantly* in the appellate court. The other judges were of a contrary opinion, but the whole court concurred in holding that on affirmance of the order granting a new trial, the cause would abate on its return to the court below.

MITCHELL v. TREANOR.

[11 GEORGIA, 324.]

ONUS TO SHOW HUSBAND'S LIABILITY FOR NECESSARIES SUPPLIED TO WIFE LIVING APART from him rests on the party supplying them.

HUSBAND IS LIABLE FOR NECESSARIES SUPPLIED TO WIFE CONSTRAINED TO LIVE APART from him by his mistreatment of her.

HUSBAND IS NOT RELIEVED OF LIABILITY FOR WIFE'S NECESSARIES BY SUBSEQUENT PROVISION made for her by a decree for past alimony, where the necessities were previously furnished.

HUSBAND IS NOT LIABLE FOR WIFE'S NECESSARIES FURNISHED ON HER CREDIT, and not on that of her husband, even if she is living with him, much less if she is living apart.

WHETHER WIFE'S NECESSARIES WERE SUPPLIED ON HER CREDIT or that of her husband, is a question for the jury.

ASSUMPSIT. The facts are stated in the opinion. The court below instructed the jury, in substance, that the plaintiff was entitled to recover, and there was a verdict for the plaintiff, and the defendant brought error.

W. S. Rockwell, for the plaintiff in error.

I. L. Harris, for the defendant in error.

By Court, LUMPKIN, J. This was an action of *assumpsit*, brought by John Treanor against John J. Mitchell, to recover the value of a bill of goods furnished by the plaintiff to the wife of the defendant. The facts, as agreed upon by the parties, are these: The merchandise charged in the account was purchased by Mrs. Mitchell in the year 1849, commencing on the third of February and ending on the twenty-seventh of December of that year; she, during the whole of that time, living separate from her husband; having been constrained, by family disagreements and unkindness, to leave his house and live apart from him, with her infant child seven years old. The articles were charged in the original book of entries to the wife, and

not to the husband. It appeared, also, that during the year 1849 Dr. Mitchell gave an order to some third person, addressed to Treanor, desiring him to supply the bearer with six yards of homespun, which the plaintiff refused to purchase, saying that Mitchell, the defendant, had no account with him.

Dr. Mitchell was then, and is now, in possession of some thirteen slaves and other property; and the things bought were suitable to his circumstances and condition in life. At the time of the separation, no provision was made for the wife. Subsequently, to wit, in February, 1850, a partial divorce was granted to her; and by the verdict of the jury, an allowance for past maintenance was decreed by the jury. Upon this testimony, is the husband liable for the debt?

As cohabitation is presumptive evidence of the wife's authority to contract, it is for the husband to rebut that presumption, by showing that the goods were supplied under such circumstances that he is not bound to pay for them; but where the husband and wife are living apart, the *onus* lies the other way, and it is for the tradesman to show that the separation has taken place under such circumstances as will render the husband liable: 2 Bright on Husband and Wife, 11, 12.

We think the proof that the wife was constrained to leave the house of the husband on account of mistreatment is sufficient to make him chargeable for her maintenance. She was ejected from his domicile with a letter of credit for necessaries.

Neither is he relieved from liability by the subsequent provision made by the court and jury for past alimony, the goods having been previously delivered.

But did Mr. Treanor deal with Mrs. Mitchell on the credit of the defendant, her husband? If he did not, then the husband is not answerable.

Chancellor Kent lays down the rule explicitly, that if the tradesman furnishes the goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with him: 2 Kent's Com. 146. *A fortiori* is he not liable if they were living apart?

Mr. Bright says the husband has been held not to be liable where the dealing with the wife took place on the credit of another; and where the tradesman made out the invoice and accounts to the wife, and drew bills of exchange for her to accept: 2 Bright on Husband and Wife, 18. Clancey maintains the same doctrine: Treatise on Husband and Wife, 25, 26.

The principle thus stated is fully sustained by all the reported

cases: See *Holt v. Brien*, 4 Barn. & Ald. 252; *Montague v. Benedict*, 3 Barn. & Cress. 631; S. C., *sub nom.* *Montague v. Baron*, 5 Dow. & Ry. 532; *Harvey v. Norton*, 4 Jur. 42; *Freestone v. Butcher*, 9 Car. & P. 647; *Metcalf v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 356.

In *Metcalf v. Shaw*, *supra*, Lord Ellenborough declared that it was a plain ground, that if the goods were not supplied on the credit of the husband, he was not liable. On a writ of error to reverse a judgment of the king's bench, it was decided in the exchequer chamber, that *assumpsit* against the husband for money lent to the wife, at the request of the wife, was not maintainable; because it appeared on the record that the contract was made with the wife, and the credit given to her, and not to the husband: *Stone v. Macnair*, in error, 7 Taunt. 432; S. C., 4 Price, 48. Being satisfied, then, that the general liability of the husband is repelled by the proof which goes to show that the credit was given to the wife, and that the plaintiff looked to her alone for payment, the cause must be sent down for another trial.

Whether a tradesman who furnishes goods to a wife gives credit to her or her husband, is a question of fact to be determined by the jury.

HUSBAND'S LIABILITY FOR NECESSARIES SUPPLIED TO WIFE: See *Cunningham v. Irwin*, 10 Am. Dec. 458, and the note thereto discussing this subject. See also *Baker v. Barney*, 5 Id. 326; *McCutchen v. McGahay*, 6 Id. 373; *Hanover v. Turner*, 7 Id. 203; *Walker v. Simpson*, 42 Id. 216; *Billing v. Pilcher*, 46 Id. 523; *Johnson v. Williams*, 54 Id. 491, and notes.

TERRY v. BUFFINGTON.

[11 GEORGIA, 337.]

TESTATOR'S MENTAL CONDITION AT TIME OF MAKING WILL DETERMINES as to his testamentary capacity; but evidence of his condition before and afterwards may be admissible to throw light on his condition at the time of execution.

EVIDENCE OF TESTATOR'S INCAPACITY SEVERAL YEARS AFTER MAKING WILL is, by itself, inadmissible to impeach his will; but such evidence is admissible after proof that his condition at such subsequent time was the same as at the making of the will.

JUDGMENT OF LUNACY AGAINST TESTATOR FIVE YEARS AFTER MAKING WILL is, it seems, inadmissible to impeach the will, even though there is independent proof that the testator's mental condition at the date of the *inquisition* was the same as at the date of the will.

MISAPPREHENSION OF PROOF OR LAW IN CHARGE OF COURT, which, it is apparent, may have defeated justice, is ground of reversal.

INSTRUCTIONS ERRONEOUS IN ONE POINT, BUT COLLECTIVELY CORRECT, and properly expounding the law as a whole, are not ground for a reversal, and the instructions are to be taken as a whole.

FRAUD AND UNDUE IMPORTUNITY ARE EQUALLY FATAL TO WILL made under their influence, though they stand on different grounds.

COMMON-LAW STANDARD OF TESTAMENTARY CAPACITY PREVAILS IN GEORGIA, and the statutory rule of some of the states, that the same capacity is required to make a will as to make a deed or contract, does not obtain here.

MERE GLIMMERING OF REASON IS SUFFICIENT TO SUSTAIN WILL in Georgia if the testator comprehends the contents of his will, the nature of the estate he is conveying, the relations and terms upon which he stands toward his family, and his own situation and circumstances; explaining *Potts v. House*, 50 Am. Dec. 329.

COURT CALLING UPON COUNSEL IN PRESENCE OF JURY TO WAIVE LEGAL RIGHT constitutes an irregularity, as where the court asks counsel in presence of a juror if they will allow the written charge to be sent to the jury; but the court will not grant a new trial for this irregularity alone.

CAVEAT against the probate of a will. The case was tried in the superior court, on appeal from the court of ordinary. The jury found in favor of the will, and the caveators brought error. The errors assigned were the rejection of the testimony of one Dr. Jones, and of a certain record of an inquisition of lunacy offered in evidence by the caveators, and also certain instructions of the court. The instructions of the court were, in substance, that the will was resisted on the ground of testamentary incapacity, fraud, and undue influence, but that the latter two grounds amounted to the same thing; that if the testator, at the time of making the will, had any mind, if he was not an idiot or lunatic, if his mind was not totally eclipsed or entirely extinguished, he had sufficient capacity to make a will; that no imbecility, eccentricity, incapacity to make contracts, or extreme old age, unless the mind was extinct from age, would invalidate the will; that if the jury should find that the testator had sufficient testamentary capacity under this rule, they should find for the will, unless it was obtained by improper influences; that to constitute improper influence it must amount to moral coercion, a constraining of the testator to make his will contrary to his wishes, by excessive importunities, threats, fear, deceit, fraud, or misrepresentations, whereby he was deprived of free agency; that persuasion, appeals to the affections or understanding, or influence obtained by kindness or affection, were not improper; and that if the jury believed the will was obtained

by improper influence or fraudulent practices, they should find against the will. The errors assigned in the charge were that the jury were not correctly instructed as to testamentary capacity; that it was error to say that fraud and undue influence in obtaining the will amounted to the same thing; that the instructions on these two points were calculated to confuse the jury; and that the question of fraudulent misrepresentations and practices, which was one of the grounds of *caveat*, was nowhere in the charge fairly submitted to the jury.

T. R. R. Cobb, for the plaintiff in error.

W. T. Van Duzer, for the defendant in error.

By Court, LUMPKIN, J. This case comes up on a writ of error, from the superior court of Elbert county, on exceptions taken at the trial of issues which came before that court, on appeal from the court of ordinary of the same county, upon a *caveat* against the admission to probate of a certain instrument of writing purporting to be the will of William Ward.

There are several bills of exception: some to the rejection by the court of evidence offered on the part of the caveators to impeach the validity of the instrument; others to a series of instructions given by the court to the jury after the testimony was closed; and one to the alleged misconduct of the presiding judge after the jury were charged with the case and had retired to their room.

The first question we are called upon to decide is as to the competency of the testimony of Dr. Edwin A. Jones. The witness examined the testator as a physician in November, 1849, and swore that at that time, from old age or some other cause, he was totally deprived of reason—"being what he would term an idiot." It was previously proven that his mental condition at that time was the same that it was in 1844, when the will was made. The evidence was objected to and excluded by the court, on the ground that it was too remote.

The general principle will not be controverted that the state of mental capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will. For notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will was made; especially if the incapacity be subsequent to the execution of the instrument.

And notwithstanding it may be true that, for the purpose of shedding light upon the state of the testator's mind when the

will was made, evidence of its condition, both before and after that period, may be produced: still, as an insulated point, we should unhesitatingly hold that proof of the imbecility of William Ward in 1849 was inadmissible to impeach a will made by him in 1844.

But here it had been already established that the state of the testator's mind was the same in 1844, and before and after that date, that it was in 1849. This laid the foundation for the introduction of Dr. Jones' testimony. For if the testator was *non compos mentis* in 1849, and his mind was in the same condition in 1844, when the will was made, then it follows irresistibly that the testator was incapable of disposing of his estate when the instrument was executed. *Per se*, the proof was objectionable; taken in connection with the other evidence, it was relevant and proper.

We are not prepared to rule that the inquisition of lunacy, found in 1849, stands upon the same footing. Had the insanity of the testator been legally established before the will was made, its continuance would have been presumed, and the *onus* cast upon the propounders of the will to show that the disqualification had been reversed. The maxim is, *Semel furibundus semper furibundus præsumitur*. The converse of the proposition, however, or the doctrine of relation back, does not hold in such cases. The strongest objection, perhaps, to the admissibility of this judgment of lunacy is that it is *res inter alios acta*. The record does not disclose that the propounders of the will were parties or privies to that proceeding.

As to the objections made to the instructions of the court, we admit that they were not so perspicuous, perhaps, as they might have been. The duty of summing up, especially where the facts are numerous and complicated, as in the present case, is often difficult to discharge. It is scarcely possible for the most enlarged and experienced mind, in the "noise and confusion" of a *nisi prius* trial, to recapitulate and group together all the testimony for and against, and to lay down with precision the principles of law applicable to the facts. And when it is apparent that justice may have been defeated by the misapprehension of the proof or the law, by the court, the error calls for correction as a matter of right.

If, however, taking all the instructions collectively, the law seems to have been properly expounded to the jury, the judgment will not be reversed, though some one opinion may be erroneous: *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450 [22

Am. Dec. 337]; *Baltimore etc. T. Co. v. Barnes*, 6 Har. & J. 57; *Coale v. Harrington*, 7 Id. 147.

Now it is conceded that fraud is a different head of objection to the validity of a will from importunity or undue influence. Indeed, they are usually the very opposites of each other. In the one case the party is induced by imposition to do willingly the act which he performs. The mind of the testator being poisoned by the fraudulent practices which have been resorted to, so far from having his free agency controlled, he delights to use the power which he has to cut off near and dear relations—a wife or children, for instance—having the strongest natural claims upon his affection. He glories in the act, however absurd, unjust, and unreasonable.

Not so with a person who has come under the power or dominion of another, and whose firmness has at last reluctantly yielded through fear, until he is made to do that which his judgment and will, if free and unconstrained, would instantly repudiate. Fraud and importunity are equally destructive of the validity of a will made under their influence. And so the judge, in substance, instructed the jury, in the conclusion of his charge, the whole of which must be taken together.

It is a curious fact, and one worth noting, that in the speeches of Isæus, the master of Demosthenes, ten out of sixty-four having been preserved, and which are the most ancient monuments extant of the kind, the orator urges the claim of kinship and blood; and hurls the bitterest reproaches against the frauds suggested in the procurement of wills.

It is contended that the court should have told the jury, upon the question of insanity, that there must be mind acting regularly; and the will, in order to be set up, should be the emanation or result of that mind.

After the somewhat elaborate treatise on wills, published by this court in 1849, for which *Potts v. House*, 6 Ga. 324 [50 Am. Dec. 329], was the text, or as some may have supposed, rather the *pre-text*, we had thought that we should not be called on again for an exposition of the phrase, “sound and disposing mind and memory.” How vain the hope for any court to entertain, that principles of law can be so stated as to bid defiance to the astuteness of counsel, against whose clients these principles operate! For myself, I am free to confess that I utterly despair of ever furnishing a “supplement” which will materially improve, much less supplant, the original work to which I have referred.

We have no other standard in Georgia by which the mental capacity of a testator is to be measured than that supplied by the common law. By the legislation of some of the states, the inquiry must always be whether, at the time of executing or acknowledging the will, the testator was capable of making a valid deed or contract; and no inferior grade of intellect will suffice. Such, however, is not the rule here. Persons of unsound mind are not permitted to make wills; because, as the law makes a just *post-mortem* disposition of the estates of intestates, it is deemed safer that the property of such persons should, like the estates of minors under a certain age, be distributed by law, rather than by the ostensible act of those who are necessarily the dupes of their imbecility or credulity.

The most sound and reflecting minds agree, nevertheless, that the right to the free enjoyment and disposition of one's property is required by the best interest of society, and it will be found that the sacredness of the right has been guaranteed and guarded in exact proportion with the advancement of civilization in the world.

In *Potts v. House*, 6 Ga. 324 [50 Am. Dec. 329], the doctrine was stated as deducible from the authorities, that "a mere glimmering of reason" was sufficient to sustain a will. We have been requested—nay, importuned—to explain what was to be understood by this language; and we are assured that it has been grossly misapprehended and perverted. The meaning we suppose to be this:

Testaments of chattels might, at common law and by the laws of this state, be made by infants of the age of fourteen, if males, and twelve, if females. This was the English rule until the statute of 1 Victoria, by which the testamentary power of infants is abolished. It is the rule here still. This, by way of illustration, we will designate as the morning dawn of reason, or the break of day of the mind, in legal contemplation. It continues to unfold and expand until it culminates to the meridian blaze of noon, when no suspicion is entertained of the competency and freedom to act of the testator. It then begins to go down, until its disk disappears beneath the horizon. Still there is the mellow glow of twilight, by which the testator is enabled to comprehend the contents of his will; the nature of the estate he is conveying to his family connection; their relative situation to him; the terms upon which he stands with them; his own situation, and the circumstances which surround him. These and like objects, although seen by the testator as

through a glass dimly, by reason of the infirmity of age or other causes, are still contemplated, not by the flashy, fitful, and evanescent glare of the *aurora borealis*, but the steady though subdued light and illumination of the "glorious king of day," although disrobed of his gorgeous and dazzling beams. The *animus testandi*, the soul of a will, animates the form of the instrument which he has executed.

As to the complaint against the court, for calling upon counsel in the presence and hearing of one of the jurors to know whether they were willing for the written instructions to be sent out to the jury after they were charged with the case and had retired to their room, we would remark, generally, that it is irregular and improper for the court to call upon counsel, in the presence of the jury, to waive any legal right whatever. It is the duty of the court to administer justice according to law: *Berry v. The State*, 10 Ga. 511.

Either the court should have delayed making the call until the juror had retired, and if necessary have dismissed him from its presence for that purpose; or what would have been better, the whole jury should have been brought back into the box, and the charge reiterated to them in the presence of the parties or of their counsel.

While we would not reverse the judgment and direct a new trial on account of this irregularity, we can not suffer it to pass without condemning the practice.

TESTAMENTARY CAPACITY, WHAT CONSTITUTES: See *Potts v. House*, 50 Am. Dec. 329; *Clifton v. Murray*, Id. 411; *Trumbull v. Gibbons*, 51 Id. 253; *Converse's Ex'r v. Converse*, 52 Id. 58; *Wright v. Lewis*, 55 Id. 714, and cases cited in the notes thereto. In *Hall v. Hall*, 18 Ga. 47, it is held, citing the principal case, that though the testator is in a dying condition when he makes his will, yet if it appears that he knew the contents of his will, his own situation with respect to his family and connections, and their claims upon him, and the nature of the estate devised, there is sufficient testamentary capacity.

MENTAL CONDITION AT TIME OF MAKING WILL DETERMINES as to the testamentary capacity of a testator: *Kinne v. Kinne*, 21 Am. Dec. 732; *Davis v. Calvert*, 25 Id. 282. But evidence of his mental and physical condition before and after the making of the will is admissible as throwing light on his condition at the time of execution: *Irish v. Smith*, 11 Am. Dec. 648; *Davis v. Calvert*, 25 Id. 282.

INQUISITION OF LUNACY is only presumptive evidence of incapacity as to acts done before the issuance of the commission and overreached by it: *L'Amoureux v. Crosby*, 22 Am. Dec. 635.

UNDUE INFLUENCE AFFECTING VALIDITY OF WILLS: See the note to *Small v. Small*, 16 Am. Dec. 257, where this subject is discussed. See also *Floyd v. Floyd*, 49 Id. 626; *Potts v. House*, 50 Id. 329; *Trumbull v. Gibbons*,

51 Id. 253; *Taylor v. Taylor*, Id. 412; *Woodward v. James*, Id. 649; *Roberts v. Travick*, 52 Id. 164, and other cases in this series cited in the notes thereto. In *Thompson v. Davitte*, 59 Ga. 476, the principal case is cited as to the distinction between fraud and undue influence as grounds of objection to the validity of a will.

INSTRUCTIONS WHICH, TAKEN TOGETHER, CONTAIN CORRECT EXPOSITION of the law of the case are not ground of reversal, though they might be exceptionable when taken separately: *Williams v. Vanmeter*, 41 Am. Dec. 644. The correctness of a charge must be determined by the whole of it taken together: *Newton v. Price*, 41 Ga. 195, citing the principal case.

BROOKS v. ROONEY.

[11 GEORGIA, 423.]

SHERIFF MAKING DEED RATIFIES LEVY AND SALE BY DEPUTY, for the purchaser's protection, though the deputy acted without any regular appointment.

ACTS OF DEPUTY SHERIFF DE FACTO ARE GOOD as to third persons.

DISTINCTION BETWEEN SALES UNDER SPECIAL POWER AND SHERIFFS' SALES on execution from courts of general jurisdiction is, that as to the former the execution of the power must show on its face that the statute was strictly complied with, as in tax collectors' and administrators' sales, while as to sheriffs' sales it is otherwise.

RECITALS IN SHERIFF'S DEED NEED NOT SHOW NOTICE AND SALE given and made according to law, nor is extrinsic proof of those facts necessary to support the deed.

ABSENCE OR IRREGULARITY OF RETURN OF SALE ON EXECUTION, or of extrinsic proof that the sale was made, does not affect the title of a purchaser under a sheriff's deed.

ERRORS OF OMISSION OR COMMISSION BY SHERIFF AFTER EXECUTION SALE, over which the purchaser has no control, do not impair his title.

EXECUTION PURCHASER'S TITLE DEPENDS ON JUDGMENT LEVY AND DEED, and other questions are between the parties to the judgment and the officer.

STATUTES PRESCRIBING NOTICE TO BE GIVEN OF SHERIFF'S SALE ARE DIRECTORY, and a neglect to observe the directions, though it may render the sheriff liable to the party injured, will not impair the purchaser's title if there be no collusion.

SHERIFF'S DEED IS NOT INVALIDATED BY DEATH OF EXECUTION DEBTOR after judgment and execution, but before levy, though his heirs are minors and there is no personal representative on his estate.

EJECTMENT. The defendants had verdict and judgment and the plaintiffs brought error founded on certain exceptions, the nature of which sufficiently appears from the opinion.

W. Dougherty, for the plaintiffs in error.

Wiley Williams, for the defendants in error.

By Court, LUMPKIN, J. This was an action of ejectment brought by the heirs at law of Martin Brooks, deceased, to recover lot No. 134, in the city of Columbus. The plaintiffs proved on the trial that they were the children and only heirs of the decedent, who died in possession of the premises in dispute, and who had lived thereon for several years previous to his death; that the rent of the lot was worth one hundred dollars per annum, and that the defendants were in possession at the time the suit was instituted.

The testimony being closed on the part of the plaintiffs, the defendants offered in evidence a deed from the sheriff of Muscogee county for the property, together with the original *fi. fa.*, and entries thereon, under which it was sold. The deed was objected to on the ground that it was made by John C. Mangham as sheriff, when the levy on the execution was indorsed by Theobald Howard, as deputy sheriff; and there was no proof to show that Howard, who made the levy, was the deputy of Mangham, who conveyed the title. It was further objected to the deed, that it did not appear from its recitals, nor was it established by *aliunde* proof, that the sale of the lot was advertised at the court-house door and two or more public places in the county; and that the sale was made between ten o'clock A. M. and four o'clock P. M., as the statute requires.

The execution was objected to, for the reason that it did not appear from the entry thereon, nor was there any other legal proof of that fact, that the lot in controversy had been sold at all, as there was no date nor signature by the officer to the entry of sale on the *fi. fa.* The defendants' counsel, to obviate this alleged omission, proved that the indorsement of sale as well as the distribution of the proceeds, was in the handwriting of Theobald Howard, the deputy sheriff. The court admitted the testimony, and to this decision counsel for the plaintiffs excepted.

The return of the levy and sale of this land is made by Theobald Howard, as deputy sheriff. The deed is made by John C. Mangham, as sheriff. This is a recognition of the deputy's authority, and a ratification of his act. And this would have been sufficient to protect the purchaser, had Howard acted without any regular appointment.

The acts of a deputy *de facto* are good as to third persons: *Doe d. Lanier v. Stone*, 1 Hawks, 329; *Lisbon v. Bow*, 10 N. H. 167; *Miller v. McMillan*, 4 Ala. 527; *Snelgrove v. Branch Bank*, 5 Id. 295; *Fowler v. Bebee*, 9 Mass. 231 [6 Am. Dec.

62]; *Commonwealth v. Fowler*, 10 Id. 290; *Buckman v. Ruggles*, 15 Id. 180 [8 Am. Dec. 98]; *Doty v. Gorham*, 5 Pick. 487 [16 Am. Dec. 417]; *Henry v. Halsey*, 5 Smed. & M. 573.

The next complaint is, that it does not appear, either by the recitals in the deed itself or by extrinsic proof, that the land was advertised and sold according to law.

The deed recites that John C. Mangham, the sheriff, seized the lot as the property of Martin Brooks, and after being advertised according to law, that he did, on the fourth day of June, 1843, at the place of public sales in said county, expose the same at public outcry.

The case of *Clements v. Henderson*, 4 Ga. 148 [48 Am. Dec. 216], is relied on as authority for the plaintiffs in error. That was an administrator's deed, and the two cases are consequently clearly distinguishable. In cases of sale under special power, as that of a tax collector, and by order of courts of limited jurisdiction, as courts of ordinary, the execution of the power must show upon its face that the statute has been strictly complied with. But it is otherwise with sales made by sheriffs under judgments of courts of general jurisdiction: *Minor v. The President and Selectmen of Natchez*, 4 Smed. & M. 602 [43 Am. Dec. 488]. This reasoning applies to the third exception, namely: that it did not appear from the entry itself on the *fi. fa.*, nor was there any proof that the lot in litigation was sold, as there was no date nor signature to the entry on the *fi. fa.* It was shown that the indorsement of the sale and of the distribution of the proceeds was in the handwriting of Theobald Howard, who made the sale.

But independently of this, the errors of omission or of commission, on the part of the sheriff, especially after the sale is made, and over which the purchaser has no control, can not affect the validity of his title. Whether the return of the execution be imperfect or not made at all, is a matter of no consequence to the purchaser, who pays his money and receives the sheriff's deed: *Doe d. Wolf v. Heath*, 7 Blackf. 154; *Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Mitchell v. Lipe*, 8 Yerg. 179 [29 Am. Dec. 116]. In *Sullivan and Price v. Hearndon*, 11 Ga. 294, this court expressed the opinion, that if the sheriff has authority to sell property, a failure in the performance of any part of his duty, and for which he would be compelled to indemnify the party aggrieved to the extent of the injury received, would not destroy the title of an innocent purchaser.

And the conclusion to be derived from a full review of all the

adjudged cases is that which is briefly announced by the supreme court of the United States in *Wheaton v. Sexton*, 4 Wheat. 503, namely: that "the purchaser depends upon the judgment, the levy, and the deed," and that "all other questions are between the parties to the judgment and the officer." See also *Cooper v. Galbraith*, 3 Wash. 546; *Hamilton v. Shrewsbury*, 4 Rand. 427 [15 Am. Dec. 779]; *Jackson d. Ten Eyck v. Walker*, 4 Wend. 462; *Lawrence v. Speed*, 2 Bibb, 401; *Newson v. Lycean*, 3 J. J. Marsh. 439 [20 Am. Dec. 156]; *Turner v. McCrea*, 1 Nott & M. 11; *Den ex dem. Osborne v. Woodson*, 1 Hayw. 24; *Den d. Martin v. Lucey*, 1 Murph. 311.

In this last case cited, the supreme court of North Carolina held that the statutes of that state, which made it the duty of the sheriff to advertise the sale in some newspaper printed in the state, and at three public places in the county, and set forth the names of the owners of the lands, the watercourses on which the lands are situated, etc., are merely directory to the sheriff in the discharge of his duty; that his neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the sheriff; and, in delivering its opinion, the court very properly suggests that a contrary doctrine would so embarrass sales of this kind, and throw so many difficulties in the way of persons willing to bid a fair price for the property, that they would not be willing to purchase. For it would not only be necessary to prove these facts on any particular occasion, but they must preserve the evidences of them with their titles, to be used at any distant period whenever these titles might be made the subject of controversy. The consequences would be, that property would become a subject of speculation merely by those who would, by purchasing at very reduced prices, only be willing to encounter the inconveniences and risks of purchasing under these embarrassing circumstances.

We believe this to be sound doctrine, and that although the failure in the performance of any part of the sheriff's duty might subject him to an action, in which he would be compelled to indemnify the owner of the land which might be irregularly sold, or the creditor to the extent of the injury received by such sale, yet it would not destroy the title of the purchaser, who has a right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law under which he sells.

I am aware that authorities may be found which seem to be in conflict with this doctrine; and which hold that the return of the officer is a necessary part of the title, and must show a strict compliance with the requirements of the statute; and that the return must set out all the facts, in order that the court may judge whether the sale is legal and according to the course of the statute. But it will be found on examination that these decisions were made on some peculiar provision in the local act under which the sale took place, or without reference to the principle to which we have already adverted, to wit: the distinction between sales made under summary proceedings, or the authority of courts of limited jurisdiction, where the facts which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*, and sales under judgments of courts of general jurisdiction. No presumption arises in favor of the exercise of power by a court of special jurisdiction. The rule is universal that the record must show everything necessary to give jurisdiction, much less does any presumption arise in favor of the legality of the acts of a tax collector or other officer who executes summarily limited power expressly delegated. He must show, or the purchaser must who claims through him, that the contingency has happened, the condition been performed, which are necessary to give validity to his acts. But not so with the sheriff, who derives his power to sell from the process of a court of general jurisdiction. In the former case, the acts of the agent are *prima facie* void. In the latter, they are *prima facie* valid—indeed, for certain purposes, conclusively so.

The last exception is, that Martin Brooks, the defendant in execution, died after the judgment and after the *fi. fa.* had issued, but before the levy, and that the heirs at law were minors at the time, and that there was no representative upon his estate.

It is conceded, that at common law the *fi. fa.* could proceed, notwithstanding the death of the defendant. But it is concluded, that by the statutes of this state a defendant, after execution has issued, has the right by affidavit of illegality to arrest the progress of the *fi. fa.* for any irregularity; to point out what portion of his property shall be seized by the officer, in satisfaction of the debt; to sue for and recover the difference between the price bid at the first and second sales, in case of non-compliance by the purchaser with the terms; that he is entitled to notice of the levy, if it be on land, as in the present case; and to appear in court and superintend personally the

proper appropriation of the money arising from the sales. That inasmuch, therefore, as there is something which the defendant may do to protect his interest, either the defendant himself must be in life, or legally represented provided he is dead, before the process can be enforced.

But is there nothing which may be done in England, after the execution has issued, to arrest its progress? What was the object of the writ of *audita querela* but to be relieved from a judgment or execution for some injustice of the party who obtained it? It is true, that the summary remedy by motion has superseded mainly this ancient process. Still the change as to the mode of relief does not weaken the force of the reply, that at common law, no less than by the statutes of this state, the defendant in execution has the right to be relieved from the wrongful acts of the opposite party.

It is manifest, then, that it will not do to rest this proposition upon the ground occupied by counsel. To change the common law in this respect, we are clear, would require the interposition of the legislature. It can only be done by statute. The argument to be deduced from the statutes already of force, and to the provisions of which I have adverted, constitutes, in our opinion, no such case of repeal by necessary implication as would authorize this court to make the change.

And while it is conceded that this is not precisely the question adjudicated in *Ingram v. Hurt*, 10 Ga. 508, yet this case is fully embraced in the reasoning of the court in that case; and it only remains to repeat here the intimation thrown out there, that is, that the court of equity is always open for the assistance and protection of minor heirs, or adults, priority creditors, or any others who are likely to be injured by the enforcement of the execution, for the want of an administration.

Let the judgment be affirmed.

SHERIFF EXECUTING DEED ON SALE BY DEPUTY, EFFECT OF: See *Gorham v. Gale*, 17 Am. Dec. 549.

ACTS OF OFFICERS OR DEPUTIES DE FACTO, VALIDITY OF: See *Hildreth v. McIntire*, 19 Am. Dec. 61, and note discussing this subject at length. See also *Burke v. Elliott*, 42 Id. 142; *Hagner v. Heyberger*, Id. 220; *Farmers' etc. Bank v. Chester*, 44 Id. 318; *Plymouth v. Painter*, Id. 574; *Miller v. Ewer*, 46 Id. 619, and cases cited in the notes thereto.

RECITALS IN SHERIFF'S DEED, NECESSITY AND EFFECT OF: See *Perkins' Lessee v. Dibble*, 36 Am. Dec. 97; *Leshey v. Gardner*, 38 Id. 764; *Reed v. Austin's Heirs*, 45 Id. 336; *Howard v. North*, 51 Id. 769, and notes.

OMISSION OR IRREGULARITY OF RETURN OF SHERIFF'S SALE does not affect purchaser's title: *Ingram v. Bell*, 47 Am. Dec. 591; *Owen v. Barksdale*,

Id. 348, 349; *Banks v. Evans*, 48 Id. 734; *Hinds' Heirs v. Scott*, 51 Id. 506, and cases cited in the notes thereto.

DEFECT IN NOTICE OF SHERIFF'S SALE does not invalidate *bona fide* purchaser's title: *Minor v. Natchez*, 43 Am. Dec. 488; *Maddox v. Sullivan*, 44 Id. 234; *Howard v. North*, 51 Id. 769, and notes. See especially the note to *Maddox v. Sullivan*, *supra*, for a discussion of the subject of a failure to advertise the sale as required by law. In *Solomon v. Peters*, 37 Ga. 255, it is held, citing the principal case, that the statute as to notice of a sheriff's sale is, as respects a *bona fide* purchaser, directory, and a failure to observe its requirements does not vitiate his title.

IRREGULARITIES AND OMISSIONS BY SHERIFF GENERALLY do not invalidate the title of a purchaser at execution sale, and such purchaser is not bound to show compliance with the statute: *Minor v. Natchez*, 43 Am. Dec. 488; *Maddox v. Sullivan*, 44 Id. 234; *Reed v. Austin's Heirs*, 45 Id. 336; *Howard v. North*, 51 Id. 769; *Byers v. Fowler*, 54 Id. 271, and notes.

WHAT PURCHASER AT SHERIFF'S SALE MUST SHOW TO SUPPORT TITLE: See *Ware v. Bradford*, 36 Am. Dec. 427; *Blanchard v. Blanchard*, 38 Id. 710; *Bybee v. Ashby*, 43 Id. 47; *Ferguson v. Miles*, 44 Id. 702; *Carson v. Hunter*, 45 Id. 273; *Den v. Durham*, Id. 512; *Owen v. Barksdale*, 47 Id. 348, and cases cited in the notes thereto.

DEATH OF JUDGMENT DEBTOR BEFORE OR AFTER EXECUTION ISSUED, effect of on sheriff's power to levy and sell: See *Buckner v. Terrill*, 12 Am. Dec. 269; *Woodcock v. Bennett*, 13 Id. 568; *Bristow v. Payton*, 15 Id. 134; *Massie's Heirs v. Long*, Id. 549; *Jones v. Jones*, 18 Id. 327; *Hanson v. Barnes' Lessee*, 22 Id. 322; *Coombs v. Jordan*, Id. 236; *Collingsworth v. Horn*, 24 Id. 753; *Harrington v. O'Reilly*, 48 Id. 704, and notes. In *Carlton v. Davant*, 58 Ga. 453, it is held, citing *Brooks v. Rooney*, that the death of a judgment debtor will not prevent the sheriff from selling his estate on execution, whether an administrator has been appointed or not.

THAT TO VALIDATE TAX SALE STATUTE MUST BE STRICTLY COMPLIED WITH, is held in *Ansley v. Wilson*, 50 Ga. 423, referring with approval to the *dictum* to that effect in the principal case. See on that point *Dikeman v. Parrish*, 47 Am. Dec. 455; *Bank of Utica v. Mercereau*, 49 Id. 189, and note referring to other cases in this series.

STATUTE REQUIRING ORDER OF SALE OF DECEDENT'S LAND TO "SPECIFY" the land as definitely as possible is held, in *Davie v. McDaniel*, 47 Ga. 205, to be directory, so that a non-compliance therewith can not be made a ground of collateral attack upon the validity of the judgment, referring to *Brooks v. Rooney*.

RUSHIN v. SHIELDS.

[11 GEORGIA, 636.]

CERTIFIED COPY OF RECORD OF DEED NOT ENTITLED TO RECORD, because it is one which the law does not require to be recorded, or because, though required to be recorded, it is not proved or attested as provided by statute so as to admit of its registration, is inadmissible in evidence. IRREGULARLY RECORDED DEED IS NOT NOTICE.

PROBATE OF DEED OMITTING TO SHOW DELIVERY DOES NOT ENTITLE IT TO RECORD so as to make a certified copy of the record admissible as evi-

dence, as where the witness, upon whose affidavit the deed is recorded, swears only that he saw the grantor sign and seal it.

DEED IS EFFECTUALLY DELIVERED, THOUGH GRANTEE IS NOT PRESENT nor any one on his behalf, and though the grantor retains control of it, if it be signed and sealed and declared by the grantor, in the presence of attesting witnesses, to be delivered as his deed, and there be nothing to qualify the delivery.

STATEMENT IN ATTESTATION CLAUSE THAT DEED WAS DELIVERED is not sufficient proof of delivery to entitle it to be recorded.

DELIVERY OF DEED MAY BE INFERRED FROM POSSESSION OF IT, or of the land conveyed thereby, by the grantee, but this is not sufficient to make a certified copy of the record of such deed evidence if the probate does not show delivery.

ADMITTING COPIES OF DEEDS FROM RECORDS IS GREAT RELAXATION OF RULE of the common law, and is productive of many frauds, and the requisites of the statute should be complied with before allowing this mode of proof.

ALIAS EXECUTION, WHERE ORIGINAL IS LOST, should not be issued, but a copy should be established.

ALIAS EXECUTION CAN NOT BE COLLATERALLY ATTACKED, though improperly issued upon loss of the original, if issued by the order of a court of competent jurisdiction.

APPLICATION OF MONEY TO JUNIOR EXECUTION BY DIRECTION OF ELDER EXECUTION CREDITOR by the sheriff operates as a *pro tanto* satisfaction of the elder writ, though the money was made on the junior execution.

EXPRESSION OF OPINION BY JUDGE, THAT THERE IS NO EVIDENCE going to prove a contested fact, to one of the jury who returns, after the retirement of the jury, to make inquiry on that point, is error, under the Georgia statute of 1850.

CLAIM in the superior court by Rushin to a certain tract of land levied upon under an execution in favor of Shields & Ball against one Croxton. The verdict and judgment below were in favor of the plaintiffs in execution, and the claimant brought error. The facts appear from the opinion.

B. H. Worrill, for the plaintiff in error.

John A. Tucker and Harrison, contra.

By Court, LUMPKIN, J. William Shields and John F. Ball, comprising the firm of Shields & Ball, holding an execution against Gideon H. Croxton, caused the same to be levied on the south half of lot No. 7, in the first section and thirty-third district of what was originally Lee county, containing two hundred and two and one half acres. The land was claimed by William Rushin. Plaintiffs in *fl. fa.* read in evidence on the trial a duplicate plot and grant, from the state of Georgia to one John Stanton, for the premises. They then offered and proposed to read a copy deed from John Stanton to James

Moore to the lot of land. Claimant objected to the testimony, on the ground that the probate was defective in this, that Henry B. Meshom, the subscribing witness, upon whose affidavit alone the deed was admitted to record, did not testify to the execution of the instrument. He swore merely that he saw John Stanton, the feoffer, sign and seal the conveyance, for the purposes therein named; and that he saw likewise Duke Hamilton and William A. Mott, the other attesting witnesses, subscribe their names as such. He does not depose to the delivery of the deed. The court overruled the objection, and permitted the paper to be read to the jury. And this constitutes the first assignment of error.

There can be no doubt, we apprehend, that where a deed is recorded which is not required by law to be recorded, a certified copy from the records would not be evidence under the statute making certified copies from the record of deeds evidence.

The same result would follow where the instrument was required by law to be recorded, but the record was actually made without authority. As for instance, by the laws of this state, a deed executed in the presence of and attested by a notary public, judge of the superior court, justice of the inferior court, or of the peace, and by one other witness, is authorized to be admitted to record. But suppose the registration was made upon the attestation alone of the magistrate, would it be pretended that a certified copy of such a deed, the original being lost, could be read in evidence in the courts of this state? Most assuredly not.

Indeed, we hold the general principle to have gone to the entire extent, although there may be some respectable authority the other way, that an irregular registration of a deed is not even notice: *Heister v. Fortner*, 2 Binn. 44 [4 Am. Dec. 417]; *Hodgson v. Butts*, 3 Cranch, 140; *De Witt v. Moulton*, 17 Me. 418; *Giddings v. Smith*, 15 Vt. 344; *Duncan v. Duncan*, 1 Watts, 322; *Tidd Pr.* 31; *Stanton v. Button*, 2 Conn. 527; *Pendleton v. Button*, 3 Id. 406; *McNeil v. Magee*, 5 Mason, 244; *Sigourney v. Larned*, 10 Pick. 72.

But the precise question here is, whether the omission to state, in the probate of a deed, that it was delivered, or words tantamount to that, is essential; it having been, in fact, delivered and registered. We are inclined to think, not without some misgivings, I admit, on my part, that a probate without proof of delivery is neither a literal nor substantial compliance

with the requisitions of the statute. Where a deed is not witnessed officially, as authorized by the thirty-second section of the registry acts, New Dig. 172, it must be "proved" by one or more of the subscribing witnesses. Is the mere statement upon oath that the conveyance was signed and sealed proof of its execution? Delivery is essential to the true execution of a deed. It would seem, therefore, that proof of delivery was necessary, before it could be legally recorded.

It has been held, that if a deed be signed, sealed, and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed, it is an effectual delivery, if there be nothing to qualify the delivery, notwithstanding the grantee was not present, nor any person in his behalf, and the deed remained under the control of the grantor: 4 Kent's Com., 5th ed., 456, note *a*.

Had the proof of Mesham gone to this length, it would have been sufficient. It is true, that in the attestation clause, it purports to be delivered, and this, it might be argued, was equivalent to a formal declaration of delivery by the grantor. But it purports to have been signed and sealed also. If one of the requisites, namely, that of delivery, may be dispensed with, why not either or both of the others?

The delivery of a deed may be inferred from its possession by the grantee, or from his possession of the land under the deed. But that does not meet the difficulty. If the deed was insufficiently proven, it was improperly admitted to record; and therefore the record, or copy of said deed, could not be legally read.

Plaintiffs next read in evidence a copy deed from James Moore to Morgan L. Brown to the land, and tendered a deed from Brown to Croxton, the defendant in execution, which the claimant objected to also, on account of the defect in the probate. Henry Johnson, one of the attesting witnesses, swore that he "saw Brown assign the within deed, and that Edmund D. Holdridge assigned with him at the same time, as a subscribing witness." The objection was overruled, and the testimony permitted to go to the jury.

If the court erred in suffering a copy from the record of the lost deed to be read in evidence, there can be no question as to this, the probate being still more defective in this case than the former.

This mode of admitting copy deeds from the records is a very great relaxation of the common-law rule, and has been produc-

tive of endless frauds in this state. And while a rigid practice or construction would work inconvenience, still it may not be amiss to remit parties to original proof, where the requisites of the statute have not been complied with.

The plaintiff then offered to read to the jury an *alias fi. fa.* under which the levy had been made, issued by Frederick D. Wimberly, clerk of the inferior court of Stewart county, in January, 1846, in lieu of an original execution, alleged to have been lost or destroyed, pursuant to an order passed at the July term, 1845, of said court. This evidence was objected to, on the ground that the original *fi. fa.* was issued by John S. Yarbrough, former clerk of the inferior court, in 1839, upon a judgment obtained in said court, at the November term, 1839. And it was insisted that a copy should have been established, instead of issuing an *alias fi. fa.* But this objection was overruled, and the testimony allowed.

We are clear, that under our statutes this *alias* execution could not properly issue. In England, the writ of *fieri facias* is not executable after the time to which it is returnable, unless kept open by special order of the court. Here, it need not be renewed until the money can be made, provided it be kept alive by the proper entries. If the original be lost or destroyed, a copy should be established, under the rules of court. If the execution becomes dormant for the want of any action within seven years, and the judgment has to be revived, in that case an *alias* execution would issue. The proceeding is, in that event, similar to that at common law, where the money has not been made by the return term of the *fi. fa.*—otherwise, a copy only should issue in lieu of the original.

But the *alias* execution having issued in this case, by order of a court of competent jurisdiction, it can not be collaterally attacked and set aside while the judgment of the court stands.

The plaintiffs having closed their case, claimant introduced one Daniel Matheson, who swore that he was sheriff of Stewart county in 1842, and in that character raised a large sum of money by levy and sale of Gideon H. Croxton's property; and that William A. Fort, the assignee of Shields & Ball, notified him to hold up the money on account of his lien, which was the oldest against the defendant; that in compliance with this notice he did retain the money until some time afterwards, when, with the consent and by the instructions of Fort, he appropriated eighty or a hundred dollars of the fund.

Claimant exhibited his title to the jury, and the testimony

being closed, the court charged the jury, among other things, that forasmuch as the money was not brought into court by the execution in favor of Shields & Ball, but under a junior *fi. fa.*, that the payment of the eighty or one hundred dollars to the junior lien, by Matheson, under the instructions of Fort, did not operate as a credit, *pro tanto*, upon the older lien. In our judgment, this instruction is directly in the teeth of the decision of this court in *Newton v. Nunnally*, 4 Ga. 366.

After the jury had retired to their room, one of the body returned into court with the bailiff, and announced to the judge that he and his fellow-jurors disagreed as to whether the execution of Shields & Ball had been levied on Croxton's property, and raised and brought the fund into court, concerning which Matheson testified; Cathy, the juror, maintained that it had been levied, but his fellows were of a contrary opinion. He asked the judge how the fact was; who stated that there was no evidence introduced upon the trial going to show that the execution of Shields & Ball had been levied, or had brought the fund into court. To which declaration of the court counsel for the plaintiff excepted. See the act of the twenty-first of February, 1850, Cobb's Dig. 462.

RECORD COPY OF DEED NOT REQUIRED TO BE RECORDED, or recorded without authority, not admissible in evidence: See *Gittings v. Hall*, 2 Am. Dec. 502; *Cheney v. Watkins*, Id. 530; *Budd v. Brooke*, 43 Id. 321; *Lée v. Mathews*, 44 Id. 498. The principal case is cited, *arguendo*, on the same point, in *Gardner v. Granniss*, 57 Ga. 554, in which case it appeared that the original record of a deed had been destroyed, and a certified copy from the record, showing no probate, having been produced, it was held that the testimony of a witness who saw the record before its destruction was admissible to show that there appeared upon the record a defective probate; and the court said that a record copy of a deed not authorized to be recorded because of a defective probate certainly did not rank as high as parol evidence. But though the probate of a deed is not such as to entitle it to record because it does not show delivery, it is held in *Eaton v. Freeman*, 63 Id. 535, 538, that it may be admitted in evidence upon proof of the handwriting of the grantor and of the subscribing witnesses, all of them being dead.

REGISTRY OF DEED NOT ENTITLED TO RECORD IS NOT NOTICE, as where the acknowledgment is defective: *Choteau v. Jones*, 50 Am. Dec. 460; *Herndon v. Kimball*, Id. 406, and notes thereto. In *Williams v. Adams*, 43 Ga. 411, it is held, approving the doctrine of the principal case on this point, that the irregular registration of a deed is not notice.

PROBATE OF DEED NOT SHOWING DELIVERY DOES NOT ENTITLE IT TO RECORD, or where the probate does not show signing by the other subscribing witnesses: *Allen v. Holden*, 32 Ga. 423, following the principal case. The case is cited to the same point in *Eaton v. Freeman*, 63 Id. 538, referred to in the first paragraph of this note. In *Dinkins v. Moore*, 17 Id. 64, it appeared that the deed in question was attested in the presence of one of the subscrib-

ing witnesses and a justice of the peace, the attestation being in this form: "In the presence of," signed with the names of the witness and the justice. This was held sufficient to entitle the deed to record, on the ground that it was a conclusion of law, from the form of attestation, that the witnesses saw the deed signed, sealed, and delivered; and the principal case was distinguished because there the witness testified affirmatively to the signing and sealing, but said nothing as to the delivery, the presumption being from such omission that he did not see any delivery.

DELIVERY OF DEED, WHAT IS OR IS NOT SUFFICIENT: See *Merrills v. Swift*, 46 Am. Dec. 315; *Lady Superior v. McNamara*, 49 Id. 184; *Boody v. Davis*, 51 Id. 210; *Blight v. Schenck*, Id. 478; *Wood v. Ingraham*, Id. 671, and cases cited in the notes thereto.

DELIVERY OF DEED MAY BE INFERRED from acts without words, or words without acts, or from both words and acts, or from circumstances: *Verplanck v. Sterry*, 7 Am. Dec. 348; *Hughes v. Easten*, 20 Id. 230; *Wood v. Ingraham*, 51 Id. 671, and notes.

DELIVERY OF DEED MAY BE PRESUMED FROM POSSESSION of it by the grantee or one claiming under it: *Boody v. Davis*, 51 Am. Dec. 210; *Hind's Heirs v. Scott*, Id. 506; *Black v. Thornton*, 30 Ga. 379, 380, citing the principal case.

ISSUANCE OF ALIAS EXECUTION WHERE ORIGINAL IS LOST was held, in *Kellogg v. Buckler*, 17 Ga. 187, to be erroneous, the proper practice being to establish a copy, citing the principal case; but it was further held, that although a writ called an *alias fi. fa.* was issued by order of the court, yet if the order showed on its face that the design was merely to establish a copy, it was sufficient.

THAT ELDER EXECUTION CREDITOR CONSENTING TO APPLICATION TO JUNIOR WRIT of money made on execution extinguishes his lien *pro tanto*, if third persons are prejudiced thereby, is held, citing *Rushin v. Shields*, in *Simmons v. Cates*, 56 Ga. 610. The case is cited to the same point in *Tarver v. Ellison*, 57 Id. 58, but it is said that it is an extinguishment only *pro tanto* as to third persons, "as much as to say, it is not extinguished if there be any other property on which it can go, and it would not have been paid off entirely if it had got the money."

EXPRESSION OF OPINION BY COURT ON FACTS, or as to what the evidence goes to prove, whether ground for reversal: See *Trovillo v. Tilford*, 31 Am. Dec. 484; *Phillips v. Kingfield*, 36 Id. 760; *Potts v. House*, 50 Id. 329; *Wilson Huston*, 53 Id. 138; *Beverley v. Burke*, 54 Id. 351, and notes. The section of the Georgia statute of February 21, 1850, referred to in the principal case on this point, was as follows: "That from and after the passage of this act it shall not be lawful for any or either of the judges of the several superior courts of this state, in any court, whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused."

ALEXANDER v. DORSEY.

[12 GEORGIA, 12.]

DESTRUCTION OF BUILDING BY FIRE DESTROYS INTEREST OF LESSEE OF ONE ROOM therein, and a re-entry by the owner of the building for the purpose of rebuilding is no eviction of such lessee so as to defeat an action for rent.

ASSUMPSIT on a note for rent of a store-house in a certain brick building containing various rooms. The defense was an eviction. The facts were that the building having been wholly destroyed by fire, the lessor entered during the term to rebuild. The decision below was in favor of the plaintiff, and the defendant brought error.

Sims and Burch, for the plaintiff in error.

Glenn and Thrasher, for the defendant in error.

By Court, LUMPKIN, J. This was an action of *assumpsit*, brought on a promissory note given for the rent of a store-room, commonly called the drug store, in the town of Griffin. The defendant sought to avoid payment upon the ground that the plaintiff had entered upon the premises and evicted him therefrom before the expiration of the term.

Without deciding upon all of the errors alleged to have been committed on the trial of this cause, we feel warranted by the testimony in assuming that the note sued on was given for the rent of a store-room in a building consisting of several stories and divers apartments. And the proof showing that the whole building was destroyed by fire, the lessee's whole interest in the property is gone. And it was no eviction in the landlord to re-enter before the expiration of the term for the purpose of rebuilding.

To rent land is one thing, but to rent a room in the second or any other story of a house is another and quite a different thing. By the former, the land itself passes; by the latter, nothing but what comes strictly within the meaning of the contract, and that is the room, together with the use of a common privy, wood-house, or any other convenience appurtenant to the building. But when the whole is destroyed by fire, it never was intended by the parties to prevent the proprietor from re-entering the premises for the purpose of reconstructing the row or block upon the ground where the former stood: *Woodfall's Landlord and Tenant*, 151.

Judgment affirmed.

DESTRUCTION OF LEASED PREMISES BY FIRE, EFFECT OF: See *Stockwell v. Hunter*, 45 Am. Dec. 220, and note. The principal case is cited and approved on the point that where one leases a single room in a building, the destruction of the building destroys his interest, in *McMillan v. Solomon*, 42 Ala. 362, and *Pope v. Garrard*, 39 Ga. 475.

MARSHALL v. MEANS.

[12 GEORGIA, 61.]

OBJECTION OF MULTIFARIOUSNESS IS DISCOURAGED by the courts where it would defeat instead of promote the ends of justice.

NO GENERAL RULE EXISTS FOR DECIDING WHEN BILL IS MULTIFARIOUS, but it must be left to the discretion of the court in each case.

BILL IS MULTIFARIOUS WHICH DEMANDS SEVERAL DISTINCT MATTERS of distinct natures of several defendants, or several entirely unconnected matters of one defendant, as where the assignee of a bond for the conveyance of land files a bill against his assignor and the original vendor to remodel and enforce the agreements between the defendants and between the complainant and his assignor, and claims also of the original vendor compensation for holding over, and for removing fences and manure, etc.

ASSIGNMENT OF MERE RIGHT TO FILE BILL IN EQUITY, the assignor having no substantial possession or capability of personal enjoyment, is void as against public policy, as where the holder of a contract to convey land, etc., on certain terms, attempts to assign the same after a breach, none of the purchase money having been paid, and the vendor being still in possession.

WANT OF VIGILANCE IS BAR TO RELIEF IN EQUITY as well as at law, as where one takes an assignment of a contract after sundry breaches, of which he might have known if he had used ordinary diligence, and then seeks compensation therefor, or pays certain notes forming the consideration of the assigned contract, with full knowledge or means of knowledge that they were drawn for too much, and then seeks repayment of the overplus

BILL to remodel certain agreements to obtain compensation for breaches, etc. Demurrer to the bill sustained and the complainant brought error. The facts appear from the opinion.

Warren and Franks, for the plaintiff in error.

Killen and Rogers, for the defendants in error.

By Court, LUMPKIN, J. This was a bill filed by Madison Marshall, against Matthew H. Means and Ephraim Kendrick. It charges, that on the sixth of January, 1849, Kendrick bought of Means lot of land No. 176, in the thirteenth district of Houston county; that Kendrick took from Means his bond for titles; that the consideration of the bond was one thousand two

hundred dollars, one half due January 1, 1850, and the other half twelve months thereafter; that in connection with and as part of the land trade, Means sold Kendrick a cotton-gin at seventy dollars, and agreed to have certain additions made to the dwelling-house; the lumber and nails with which to construct these improvements being estimated at fifty dollars; that the consideration of the gin, lumber, and nails was included in the land notes, and made in all, one thousand three hundred and twenty dollars, to be divided into two notes of six hundred and sixty dollars each. That instead of the notes being given, each for that amount, one of them was for six hundred and seventy-eight dollars, and the other for six hundred and eighty six dollars and ninety-five cents; that as a part of the land trade, Means was to clear and to cultivate twelve acres of land, which at the time was under fence. That the improvements on the house and the clearing the land was to be done in 1849, and possession to be delivered the first of January thereafter; that in executing the bond, all that part of the contract in relation to the improvement of the house, clearing of the land, the gin, lumber, and nails, was by mistake or fraud left out of the agreement.

That on the twenty-sixth of December, 1849, Marshall, the complainant, bought of Kendrick the land, and took an assignment of the bond for titles, and assumed the payment of the notes given by Kendrick to Means. The original bill charges that the complainant, "confiding in the statements and assurances of Kendrick, was induced to make said contract, and promises and agrees to take up the note," but in the amended bill he states that but for the assurances of Means, that the facts set forth in the bill were true, he would not have made this bargain. The bill further states, what appears by inspection to be true, that the assignment of Kendrick of the bond omitted to specify the terms of the contracts, both between himself and Kendrick, and between Kendrick and Means.

That the complainant has paid off the notes, which he found transferred to a third person. The bill does not admit that he has received a deed, but it is to be inferred that he has. On the first of March, 1850, he obtained possession of the premises; that before he left the land, Means hauled off forty loads of lot and stable manure, and two thousand fence-rails.

The bill seeks to remodel the contracts between Means and Kendrick, and Kendrick and complainant; and prays that Means be decreed to pay the value of clearing the twelve acres of land,

the additions to the house, the lumber and nails, the mistake of forty-four dollars and ninety-five cents in the amount for which the notes were given; also, fifty dollars rent, for holding over the land for two months, together with the value of the manure and rails hauled off by Means, while he held possession in 1850. "Or if on the coming in of the answer and the submission of the proofs, on investigation, it should appear that all the charges in said bill are false, that then the said Kendrick, for his fraud, be required and compelled to make due and adequate compensation for his default in the premises."

To this bill a demurrer was filed, on two grounds: 1. Because it was multifarious; 2. For want of equity. Is this bill multifarious? We think so, most clearly, unless indeed parties are permitted to include in the same proceeding any and all matters of controversy which exist between them. I am aware that the courts always discourage the objection of multifariousness, where instead of advancing, it would defeat the ends of justice. And that there is no general rule by which to determine whether a bill is multifarious or not; but it must be left to the discretion of the court, under the circumstances of the case.

Still, we understand the doctrine to be, to this extent, well settled: that a complainant is not permitted to demand several distinct matters of distinct natures of several defendants, nor several matters perfectly unconnected against one defendant.

Now, conceding that all the other matters of complaint grew out of the original contract, and are germane to it, what has the rent which is claimed for the occupation of the premises by Means, for two months after the time when he should have delivered them up, to do with the first agreement? or the manure and fence-rails, which are alleged to have been hauled off? And what has Kendrick to do with these grievances committed by Means? So far from Means and Kendrick being chargeable as confederates, their interests are directly antagonistic to each other, and the prayer is in the alternative, that if the testimony shall, on the trial, not be sufficient to convict the one, that a recovery may be had against the other.

As to the holding over by Means for two months, and the removal of the manure and the rails, Marshall has an ample remedy at law, provided he has a title to the land. He nowhere avers that he has not; and it was necessary to make this allegation before he could ask the aid of a court of equity. But it is clearly inferable from the bill that he has a deed. He took possession of the premises in March, 1850. He states in one

place that he could not induce Means to make him a conveyance without paying up the whole amount of the notes, which he avers he has done. While setting forth the specific injuries received at the hands of Means, for failing to perform his various undertakings, and the amount of damages accruing to the complainant from each, he does not complain of his failure to execute titles as one of them; nor does he pray for titles to be decreed. The conclusion is inevitable that he has them. And if so, then the common-law remedy is complete for the injuries complained of, other than those arising out of the original agreement.

But without dwelling longer upon the question of multifariousness, is there any equity in this bill? We think not. The alleged breaches had all accrued prior to the time when the purchase was made by Marshall of Kendrick. The contract between Means and Kendrick was made the sixth day of January, 1849. All that was promised to be done was to be performed during that year, and possession delivered the first day of January following. Marshall bought of Kendrick the twenty-sixth of December, 1849, while Means was still in possession of the premises, and before the notes given for the purchase money were paid, or any part of them. The assignment, under these circumstances, could not be made. It is contrary to public policy, and savors of the character of maintenance; 2 Story's Eq. Jur., sec. 1040.

It is a bare right to file a bill in equity. Before such an interest can be assigned, so as to give the assignee a *locus standi in judicio* in chancery, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to maintain a suit. 2 Story's Eq. Jur., sec. 1040.

In *Prosser v. Edmonds*, 1 You. & Coll. 481, 496, 499, Lord Abinger said: "The assignee purchases nothing but a hostile right, to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. What is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There

are many cases where the acts charged may not amount precisely to maintenance or champerty; yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice."

Lord Abinger continues: "Mr. Gridlestone was so obliging as to furnish me with a case, that of *Wood v. Downes*, 18 Ves. 120, in which it appears to me that the principle laid down by Lord Eldon goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances, which it was alleged were obtained by the defendant in consequence of his situation of solicitor to the plaintiff; the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord Eldon, in decreeing relief, adopted not only the ground that the party was the solicitor for the plaintiffs, but that the transaction was contrary to good policy. He said: 'The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty;' and he accordingly decreed the conveyance to be set aside, on the ground of litigated title. Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases."

But there is another principle upon which relief should be refused the complainant. Neither equity nor law will assist those who neglect to take care of themselves. *Vigilantibus non dormientibus jura subveniunt* is one of the earlier maxims which we learn, both at the bar and from the books. The whole doctrine of limitations is built upon it. Why did not Mr. Marshall see whether or not the things which were to have been done during the year 1849 were done the last of that year, when he purchased? He does not allege any misrepresentation, either by Means or Kendrick, as to the execution of the contract, or that his confidence was abused in this matter. Why did he not, on the twenty-sixth of December, 1849, examine and see whether the additions to the house had been constructed in a workmanlike manner, and whether the twelve acres of land had been cleared and rendered fit for cultivation? These were matters open to the eyes of the commonest observer. And if they were not already done when he made the purchase, they never could be, for the time had arrived when, according to the agreement, possession was to be delivered of the premises. He is guilty of

the grossest negligence on his part, and assigns no excuse whatever for it. It is not pretended that any artifice was resorted to, either to divert his attention or prevent him from making the necessary inquiry or examination.

Again, when he went to pay the notes, and discovered that they were drawn for forty-four dollars and ninety-five cents too much, why did he not at once repudiate the contract? Even an express warranty is no protection against visible defects in personal property. A party having eyes must see, or take the consequences.

In no view, therefore, which we can take of the case can this bill be sustained.

ASSIGNABILITY OF MERE RIGHT TO FILE BILL IN EQUITY.—The rule of the ancient common law forbidding the assignment of choses in action never was the rule in equity, but in that forum things resting in action were, in general, equally assignable with things in possession: 3 Pomeroy Eq., sec. 1270; Bisph. Eq., sec. 164; 2 Story Eq., sec. 1040; *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 312. But even in equity a mere litigious right, such as a right to sue in equity to redress a fraud, was not assignable, because it tended to promote litigation and savored of maintenance: Adams Eq. 54; 2 Spence Eq. 868; 1 Pars. Cont. 225; 2 Story Eq. Jur., sec. 1040 b; Pomeroy on Rem., sec. 153; 3 Pomeroy Eq., sec. 1276; Bisph. Eq., sec. 166. Thus the bare right of a grantor to avoid a deed for fraud in obtaining it is not assignable: *Prosser v. Edmonds*, 1 You. & Coll. 481; *Norton v. Tuttle*, 60 Ill. 130; *Morris v. Morris*, 5 Mich. 171; *Brush v. Sweet*, 38 Id. 574; *Dickinson v. Seaver*, 44 Id. 624; *Smith v. Harris*, 43 Mo. 557; *Crocker v. Bellangee*, 6 Wis. 645. Therefore, where a son being entitled to a certain property under his father's will assigned the whole of that property, except a reversionary interest in the funds, to his father's executor, for value, and afterwards assigned his whole interest under the will, including the reversionary interest, to another person, it was held that the latter could not maintain a bill, in which the son refused to join, against the father's executor to set aside the prior assignment on the ground of fraud committed by such executor: *Prosser v. Edmonds*, 1 You. & Coll. 481. In that case Lord Abinger said: "Where an equitable interest is assigned, it appears to me that in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overturn a legal instrument." Further on, in the same opinion, he says: "It has been the opinion of some learned persons, that the old rule of law, that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee to stand in the right of the assignor. This is not that case. Robert Todd [the son], when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case

can be found which decides that such a right can be the subject of assignment, either at law or in equity." Other quotations from Lord Abinger's opinion are given in the principal case.

In *De Hoghton v. Money*, L. R., 2 Ch. App. 164, it appeared that Money, the defendant, claimed a right in certain land under a lease from one Cotton. The plaintiff entered into a contract with Cotton for the purchase of the land, without reservation, except as to the disputed claim of Money under the said lease alleged in the plaintiff's bill to have been obtained by concealment, surprise, and undue influence, and the said Cotton agreed to permit and afford to the plaintiff every facility for filing a bill to set aside the said lease; and it was held that the plaintiff had no *locum standi* to maintain a bill against Money to set aside the lease. In that case, Sir G. J. Turner, L. J., in delivering the opinion, said: "I do not say that what appears in this case amounts in strictness to champerty or maintenance, nor do I even say that there may not be cases in which a purchaser who has completed his contract may be well entitled to impeach a title founded upon fraud committed upon his vendor; but I do not hesitate to say that, in my opinion, the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser can not call upon this court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savors of it too much for this court to give its aid to enforce the agreement." In *Norton v. Tuttle*, 60 Ill. 130, it appeared that the plaintiff held a power of attorney, by way of assignment, from a certain party to maintain a bill against the defendant to set aside a certain conveyance obtained by the defendant as guardian of the plaintiff's assignor, on the ground of undue influence in obtaining it, and it was held that, notwithstanding the assignment, the assignor might dismiss a suit begun by the plaintiff to set aside said conveyance, because the right to sue was not assignable. So in *Milwaukee and Minnesota R. R. Co. v. Milwaukee and Western R. R. Co.*, 20 Wis. 174, a right of action to set aside a release from the obligation of a covenant, on the ground that the release was fraudulently procured, was held not to be assignable. So in *Morrison v. Deaderick*, 10 Humph. 342, a right to maintain a bill to recover money fraudulently extorted under a pretext of a sale of goods was held not assignable. So an administrator's statutory right to set aside a fraudulent conveyance by his intestate was held not assignable, in *Morris v. Morris*, 5 Mich. 171. A right to sue trustees of a trust fund for interest and profits of the fund is held not to be assignable, in *Hill v. Boyle*, L. R., 4 Eq. 260.

Notwithstanding the doctrine laid down in the cases above cited, it is held that a subsequent grantee of property, previously conveyed by a deed voidable in equity, may maintain a bill to set aside such prior conveyance: *Dickinson v. Burrell*, L. R., 1 Eq. 337. So it is held that an assignee for the benefit of creditors of an insolvent debtor may maintain a bill to set aside a prior conveyance or assignment by the debtor on the ground of fraud practiced by the grantee or assignee: *McMahon v. Allen*, 35 N. Y. 403. In both the cases last cited, *Prosser v. Edmonds*, 1 You. & Coll. 481, is distinguished, on the ground that in that case there was an assignment of a bare right to sue. In *Dickinson v. Burrell*, L. R., 1 Eq. 333, Lord Romilly says: "The distinction is this: if James Dickinson [the assignor] had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property or his interest in the property which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill;

but if A. B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it in my opinion a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it."

With all due deference to the opinions of Lord Romilly and of other judges holding to a similar view, it seems to us that the distinction between an assignment of a right to sue to set aside a fraudulent conveyance, and a subsequent conveyance of the same property with an incidental right to set aside the prior fraudulent conveyance, is simply the distinction between tweedledum and tweedledee. What can be the substantial difference between the assignment of a right to acquire property by setting aside a fraudulent conveyance of it, and an assignment or conveyance of the property with an incidental right of setting aside the prior fraudulent conveyance?

In *Smith v. Harris*, 43 Mo. 557, it is held that although the right to set aside a conveyance for fraud is not assignable, yet if the assignee's right to the property does not depend upon the assignment, but if he is already in possession under a prior conveyance, and merely takes a quitclaim deed to cure his title, he may sue to set aside a prior conveyance for fraud. In *Marvin v. Inglis*, 39 How. Pr. 329, it is decided, contrary to the doctrine of some of the cases above cited, that a right of action to set aside an assignment of a mortgage on the ground of fraud, and to recover back the money received thereon, is assignable.

BUYING OF THINGS IN LITIGATION OR DORMANT TITLES: See the note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 321.

MULTIFARIOUSNESS, WHAT CONSTITUTES: See the note to *Fellows v. Fellows*, 15 Am. Dec. 427; *Worthy v. Johnson*, 52 Id. 399, and cases cited in the note thereto. The doctrine of the principal case on this point is approved in *Dewberry v. Shannon*, 59 Ga. 318.

WRIGHT v. HICKS.

[12 GEORGIA, 155.]

COMMON-LAW RULE AS TO LEGITIMACY OF OFFSPRING born in wedlock was that if a wife had issue while her husband was within the four seas, that is, within the jurisdiction of the king of England, such issue was conclusively presumed to be legitimate, except upon proof of the husband's impotence; but in modern times the severity of this rule has been abrogated, and the legal presumption of the husband's access, in such a case, may be controverted by other direct or presumptive evidence.

CHILD BORN THREE MONTHS AFTER MOTHER'S MARRIAGE IS PRESUMED LEGITIMATE, but this presumption may be rebutted in either a civil or criminal case by evidence of non-access or other proof, either by the husband or by any other person having an interest in contesting the legitimacy.

HEIR CAN BE DISINHERITED ONLY BY EXPRESS DEVISE OR NECESSARY IMPLICATION so strong that a contrary intention can not be supposed.

INTENT TO DISINHERIT HEIR IS ESSENTIAL to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent.

COURTS CAN NOT GIVE EFFECT TO WILL CONTRARY TO PLAIN TERMS of it, upon a mere conjecture as to the intention.

THOUGH INTENT TO DISINHERIT HEIR APPEARS, IF ESTATE IS NOT DEVISED to some other person the law casts it upon the heir.

ALLEGATIONS IN BILL SEEKING TO BASTARDIZE ALLEGED HEIR of a decedent, born three months after the mother's marriage, are insufficient if the illegitimacy is not expressly charged, and if it is not alleged that no intercourse had ever taken place between the husband and wife before marriage.

BILL filed by the complainant as administrator of Jemima Culpepper, deceased, against the defendant as administrator, and administrator *de bonis non cum testamento annexo*, of Daniel Culpepper, deceased, to compel a delivery of property in his hands, and also to have Berry Wesley Culpepper, the grandson and alleged heir of Daniel Culpepper, decreed a bastard. The bill alleged the death of Daniel Culpepper, leaving a considerable estate, and his widow, Jemima Culpepper, surviving him, after having devised as follows: "Item 1. I give and bequeath unto my beloved wife, Jemima Culpepper, all my estate, both real and personal, during her natural life, after paying all my just debts—with the following reservations, to wit: Item 2. I give and bequeath unto Berry Wesley Culpepper (so called) five dollars out of any money belonging to my estate." The will further reserved and bequeathed a certain sum, after the widow's death, to wall in the graves of the testator and his family, and the widow was appointed executrix. The bill also alleged the subsequent death of Jemima, and the appointment of the defendant as administrator of Daniel Culpepper, etc. There were further allegations to the effect that Isaiah Culpepper, deceased son of Daniel, was married to one Elmira Sullivan, who, three months after marriage, gave birth to a son, the said Berry Wesley; that the day after the marriage the said Isaiah, having discovered his wife's pregnancy, repudiated the marriage and sent his wife back to her father, protesting his innocence of any prior knowledge or suspicion of her want of chastity. It further appeared from the bill that Isaiah was the testator's only son, and died before the testator, leaving no children unless it be the said Berry Wesley. Demurrer to the bill sustained, and the plaintiff brought error.

Poe and Hall, for the plaintiff in error.

G. R. Hunter, for the defendant in error.

By Court, LUMPKIN, J. Berry Wesley Culpepper, the son of Isaiah Culpepper, and grandson of Daniel and Jemima Cul-

pepper, having been born in three months after the marriage of his parents, both of whom are dead, claims to be the heir at law, through his reputed father, to his grandparents; and the first great question to be settled is, whether or not his legitimacy may be disputed, so as to exclude him from the inheritance. And if so, what are the principles of law applicable to the case?

I need scarcely remark, that cases of adulterine bastardy are new in the courts of this state. May the day be far distant when our courts shall be inundated with indecent and demoralizing investigations, as to whether the husband or another be the father of children born within wedlock! Such inquiries can not fail to contaminate the morals and destroy the peace of society.

The doctrine upon this subject has fluctuated greatly in England. The oldest law-writers—Granville, Bracton, Fleta, and Britton—seem to have considered that circumstantial evidence was admissible to counteract the maxim of the civil law, *Pater est quem nuptiæ demonstrant*—or the presumption of legitimacy arising from the birth of the party within lawful wedlock.

But it appears from the year-books, that rules of pleading were laid down by the English courts, at an early period, the effect of which was to treat the presumption in favor of legitimacy as conclusive, unless it could be opposed by evidence of the husband's impotency; or of his being beyond seas during the whole period of the wife's gestation.

And Lord Coke, in his commentary on Littleton, lays it down, that, by the common law, if the husband be within the four seas (that is, within the jurisdiction of the king of England), and his wife have issue, no evidence is admissible to prove the child a bastard; except in the sole case of apparent impossibility of procreation by the husband, as of his not having attained the age of puberty: Co. Lit. 244 a. See also Jenkins' Eight Centuries, 10; *Regina v. Murrey*, 1 Salk. 122.

During the reigns which immediately followed, the presumption in favor of the legitimacy of a married woman's offspring was strict and unyielding to an extreme; whether, as has been supposed, from motives of policy, to protect the fruits of the profligacy of kings and nobles from the perils of disinheritance, I will not undertake to affirm.

It is hard to believe, at the middle of the nineteenth century, that there ever existed, in any enlightened country, a law so diametrically opposed to every principle of reason and common

sense, as that the children of a married woman should in all cases be deemed legitimate, provided the husband was anywhere within the four seas which surrounded the island of Great Britain, and was endowed with generating potency.

And yet to such an absurd length was the principle carried that it was solemnly decided by a court of the highest jurisdiction that a child born in England was legitimate, although it appeared on the fullest evidence that the husband resided in Ireland during the whole time of the wife's pregnancy, and for a long while previously, because Ireland was within the king's dominion.

In another instance, where the husband resided in Cadiz, the child was held to be a bastard; not because Cadiz was at a greater distance, but because it was beyond the four seas.

In modern times the severity of the *quatuor maria* rule has been done away with, and a doctrine adopted more conformable to the standard of reason and good sense, and more in accordance with what seems to have prevailed at the earliest period of the law. Lord Raymond, of virtuous memory, to his honor be it recorded, was the first judge who had the courage, in 1732, in the case of *Pendrell v. Pendrell*, 2 Stra. 925, to decide that the legal presumption of the husband's access might be controverted by other proof.

This opinion has been sanctioned by innumerable subsequent determinations, and the law now is universally understood to be clearly settled that, although the birth of a child during wedlock raises a presumption that such child is legitimate, yet that this presumption may be rebutted both by direct and presumptive evidence. And in arriving at a conclusion upon this subject, the jury may not only take into their consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct and of declarations connected with conduct, and to any induction which reason suggests for determining upon the probabilities of the case. Where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is the fruit; but it is only a very strong presumption, and no more. This presumption may be rebutted by evidence, and it is the duty of the jury to weigh the evidence against the presumption, and to decide as in the exercise of their judgment either may appear to preponderate: 5

Phillips on Ev., 6th American from the 9th London edition, by Van Cott. See also the opinions of lords Eldon, Redesdale, and Ellenborough in the case of the *Banbury Peerage*; the answers of the twelve judges in the same case.

Mr. Mathew, in his treatise on presumptive evidence, p. 22 et seq., says: "The presumption in favor of legitimacy still holds, whenever it is not inconsistent with the facts of the case; and it is right that it should. It results from the principles of natural justice; it rests simply on the supposition of the virtuous conduct of the mother—a branch of that equitable rule which assumes the innocence of a party, until proof be brought of actual guilt. Yet, if such circumstances be in proof as clearly negative the truth of this presumption, the legal intendment will fail, and no general rule of evidence, of universal application, can be prescribed upon this subject. In every case, the fact must be determined by the particular circumstances.

Where the husband and wife reside at a distance from each other, so as to exclude the possibility of sexual intercourse, there it is admitted that the presumption of legitimacy is at once rebutted. But in the opinion of the judges, in the *Banbury Peerage Case*, a man and wife may dwell in the same place, and in the same house, and yet, under circumstances such as, instead of proving, tend to disprove, that any sexual intercourse took place between them.

So it has been laid down, that the presumption of access, by which is now meant sexual intercourse, though fortified by the strong fact of a private intercourse, is nevertheless open to rebuttal, by evidence of the feelings and conduct of the parties—such feelings and conduct as were displayed immediately before and after it.

And I apprehend that a case might arise where mere proof of the fact of sexual intercourse, at or about the time of conception, would not be conclusive evidence of the legitimacy of the offspring. For instance, suppose that an adulterous connection was shown to have existed between the wife and a negro, at or about the time when the child should have been begotten, and the color and other physiological developments of the offspring demonstrated its African paternity, might it not be bastardized? See Harris Nicolas, whose work on the law of adulterine bastardy contains every authority and every case, published and unpublished, in its chronological order, which bears upon this subject; maintains the correctness of Lord Coke's exposition of the law, and of its sound policy, at least, after it became so far

modified as to abandon the rule of the *quatuor maria*, while it required evidence of the absolute impossibility of the husband's being the father of his wife's child, from whatever cause that impossibility might arise, instead of making the impossibility depend upon corporeal infirmity or geographical limits.

And it must be admitted that such a rule has this to recommend it: it is clear, certain, positive, intelligible, and well defined; and it would seem to have the sanction of the supreme court of the United States, as we gather from one of the head-notes to the report of the celebrated case of *Patterson v. Gaines*, 6 How. 550: "If the fact of marriage be proved, nothing can impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father."

I have looked carefully through the opinion of the court delivered in this case, without being able to deduce this proposition as strongly and definitely as it is here stated.

We adhere, however, to the opinion already intimated, and such is our determination, that marriage is to be regarded in no other light than presumptive proof that the husband is the father of all the children born during wedlock, or within a competent time afterwards; that either in a civil suit or on a criminal prosecution, by the evidence of non-access or other testimony, the presumption of the legitimacy of the offspring may be rebutted.

That the same rules apply, whether the bastardy originates before or during marriage. If a man marries a woman pregnant by another person, the law presumes the child to be the husband's; and whether she was a reputed virgin or *grossment en-sient*, the books make no distinction. In both cases the law says it is presumptively his child; still he may show by whatever proof he may command, that he has been made the innocent victim of fraud and artifice.

And the same proof may be adduced by any one whose interest and right it is to contest the legitimacy of the pretender; and inexpressibly hard would it be if such privilege was not allowed. It is repugnant to the feelings of every man, that his property, upon his demise, should descend through channels where his blood did not flow—channels, too, tainted and corrupted by the grossest impurity.

The other main question made by the record is, whether Mrs. Jeninna Culpepper took a life estate only, in the property of her deceased husband, or whether she is entitled, together with her

reputed grandson, Berry Wesley Culpepper, as heirs at law, of Daniel Culpepper, to the fee.

We take these principles to be well settled, namely: that the heir at law can only be disinherited by express devise or necessary implication; and that implication has been defined to be such a strong probability, that an intention to the contrary can not be supposed: 1 Jarm. Wills, 466, and the authorities cited; and that the intention to disinherit the heir, is always necessary to raise an estate by implication: *Id.*, note 2. That devises, by implication, are sustainable only upon the principle of carrying into effect the intention of the testator; and unless it appears upon an examination of the whole will that such must have been his intention, there is no devise by implication: *Id.*, note 3.

And, lastly, that courts are not permitted to give effect to the will of the testator, contrary to the plain and obvious terms used by him, upon a mere conjecture as to his intention: *Manigault v. Holmes*, 1 Bail. Eq. 298.

Again, in the absence of anything in the will to the contrary, the presumption is, that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect.

If the estate is not devised to some other person, though the intention of the testator be never so manifest to disinherit the heir, still the law casts the estate upon the heir: *Denn v. Gaskin*, 2 Cowp. 657. This was a devise of a freehold estate, to three nephews, without words of inheritance; a legacy of ten shillings to the heir at law, and after some other legacies, the residue of the personal estate to the nephews. It was held that the nephews took only a life estate in the lands, and the heir at law, the fee—the intention to disinherit him being wanting, it could only be inferred from a vulgar notion that a small legacy was evidence of such an intention, which Lord Mansfield held to be insufficient.

In *Houell v. Barnes*, Cro. Car. 382, an estate was devised to A. for life, and after death, ordering his executors to sell and divide the proceeds. It was held that the intention to disinherit the heir was wanting, notwithstanding the executors had authority to sell and divide the proceeds.

In *Schauber v. Jackson*, 2 Wend. 13, this whole doctrine underwent a most searching examination. There, the testator

bequeathed to his son Simon, who was the heir at law, twenty shillings for his birthright, to be raised and levied out of his estate, "wherewith he utterly excludes, debars, and precludes him from having or claiming any other or further pretensions, claims, and demands whatever, as being his heir at law, or by any other pretense whatever." He then bequeaths certain articles of personal property to his other children, and twenty-five pounds to his son Johannes, to be raised out of moneys arising from his real and personal estate. He then authorizes and empowers, orders, and directs his executors to sell and dispose of his whole real and personal estate, as well in New York as elsewhere (except the personal estate before bequeathed), either at public or private sale, and declares their conveyance valid and effectual to convey all his estate. He directs the money arising from such sale to be applied, first, to pay the legacies, and the balance to be divided: one fifth to each of his sons, Simon and Johannes; one fifth to each of his daughters, Maddalena and Engeltze; and one fifth to his grandson, Jacobus Berry, the share of his grandson to be retained till his maturity or marriage, in the hands of his executors, and in case of his death, to be divided among the four children above named. He then appoints his son Johannes and daughter Engeltze executors of his will. Engeltze filed her renunciation as executrix, and the will was proven, and letters testamentary granted to Johannes. According to the English law, in force at the time of the death of William Appel, the testator, his oldest son, Simon, would have been entitled, by right of primogeniture, to the estate in question, as heir of his father, unless the descent was broken by or under the provisions of this will.

The only question made in the court of errors was, whether by the will any part of the legal estate was devised to the executors; or whether they had a naked power to sell only, and distribute the proceeds.

The supreme court decided that there being no direct devise, either to the children or to the executors, there was nothing to prevent the descent of the estate to the heir at law. And the chancellor, together with nine senators, voted for affirming the judgment; twelve senators for reversal. Stebbins, one of the majority, argued the question at great length, and with much ability, and he concedes "that, had the will stopped after declaring that Simon, the heir, should not take the estate, he would nevertheless have taken, because it would have been given to no other person."

Here there are no words of exclusion in the will of the heirs at law; neither is the inheritance given to any other person. Of course the fee is cast upon them by descent.

Let us next apply these principles to the pleadings, and see whether there was error in dismissing the complainant's bill. It is brought by Elias S. Wright, as administrator of Jemima Culpepper, deceased, against Lewis F. Hicks, as administrator generally, and also as administrator *de bonis non cum testamento annexo*, of Daniel Culpepper, deceased, to recover the residue of the estate of said Daniel out of the hands of the defendant. It seeks a decree for the whole surplus, upon the ground that the ostensible co-heir, to wit, Berry Wesley Culpepper, was an illegitimate.

Were the allegations in the bill, admitting them to be true, sufficient to bastardize this boy? We think not. The bill does not even expressly charge the illegitimacy of Berry Wesley Culpepper, which it should do, and that notwithstanding he was born within three months after wedlock, that no sexual intercourse had ever been had or taken place between the said Isaiah Culpepper and his mother previous to their marriage.

The order of the court dismissing the bill was manifestly wrong, admitting that the averments were insufficient as to the bastardy. It should have been retained at least for the purpose of enabling the administrator of old Mrs. Culpepper to secure from the defendant the moiety of the estate coming to his intestate. Consequently the bill must be reinstated, with leave to amend in the particulars indicated.

I regret sincerely that the reporter is forbidden to publish *in extenso* the argument submitted by Robert P. Hall, esq., in this case. It would constitute an abiding monument of his ability and research, and deserves to be preserved in an enduring form.

PRESUMPTION THAT CHILD BORN IN WEDLOCK IS LEGITIMATE: See *Gurvin v. Cromartie*, 53 Am. Dec. 406; *Eloi v. Mader*, 38 Id. 192, and note. That this presumption is disputable is a point to which the principal case is cited with approval in *Wright v. Hicks*, 15 Ga. 169, which was a subsequent decision in the same case reaffirming its doctrine: *Sullivan v. Hugly*, 32 Id. 322, and *Baker v. Baker*, 13 Cal. 100. The case is cited on the same point in *Phillips v. Allen*, 2 Allen, 454, where it is held that it must appear beyond all reasonable doubt that the husband could not have been the father of the child, to rebut the presumption of legitimacy in such a case. So in *Sullivan v. Hugly*, 32 Ga. 322, it is held that it must appear by evidence of non-access, impotence, or other evidence that it was absolutely impossible for the husband to be the father.

HEIR MAY BE DISINHERITED BY IMPLICATION, WHEN: See *Boisseau v. Aldridges*, 27 Am. Dec. 530. In *Miller v. Speight*, 61 Ga. 462, the principal case is cited to the point that an intention to disinherit the heir must affirmatively appear to be effectual.

IF ESTATE NOT OTHERWISE DISPOSED OF, HEIR TAKES IT: *Boisseau v. Aldridges*, 27 Am. Dec. 590; *Ingram v. Fraley*, 15 Ga. 169, citing the principal case.

COURT CAN NOT GIVE EFFECT TO WILL CONTRARY TO PLAIN TERMS OF INSTRUMENT: *Hill v. Alford*, 46 Ga. 252; *Whitehead v. Park*, 53 Id. 577, both citing the principal case.

DIBBLE v. BROWN.

[12 GEORGIA, 217.]

DELIVERY OF BAGGAGE TO COMMON CARRIER must be shown to make him chargeable for its loss, but any evidence tending to prove delivery is sufficient to carry the case to the jury; as where it is shown that at the time the passenger entered the carrier's vehicle his baggage was present in the hands of a servant of the carrier waiting at a hotel of which the latter was proprietor and at which the passenger was a guest, and that the servant was informed by the passenger that he wished his baggage to go with him.

PLAINTIFF OR HIS WIFE IS COMPETENT TO PROVE CONTENTS OF LOST TRUNK in an action against a common carrier for its loss, though no spoliation by the carrier is charged, if there is no other evidence to prove the contents, but not otherwise.

PASSENGER CARRIERS ARE LIABLE FOR BAGGAGE of passengers as common carriers.

BAGGAGE FOR WHICH PASSENGER CARRIER IS LIABLE INCLUDES articles of necessity or personal convenience usually carried by passengers for personal use, but not merchandise or valuables carried for sale or the like, but it may, it seems, include other articles of limited value and ordinary bulk which a passenger may take with him, though not constituting wearing apparel or other appliances of necessity, comfort, or convenience.

IN DETERMINING WHAT IS BAGGAGE, USAGE, TRAVELER'S STATION, CONDITION, and other circumstance are to be considered, and no uniform rule can be laid down.

AS TO EXTRA BAGGAGE, CARRIER MAY STIPULATE FOR COMPENSATION beyond the passenger's fare; so as to articles of a disproportionate value.

DEPOSITION AS TO CONTENTS OF PASSENGER'S TRUNK, SOME OF WHICH ARE NOT BAGGAGE, is not therefore to be excluded in an action against a carrier for its loss if any of the articles are such as are properly included in the term "baggage," the recovery being limited to the value of such articles only.

ACTION to recover the value of a trunk. The opinion states the case.

De Graffenried, and Hall and Hall, for the plaintiff in error.

Poe, Nisbet, and Poe, for the defendants in error.

By Court, NISBET, J. This action was brought to recover the value of a trunk and its contents, from the defendants, as common carriers. The defendants were proprietors of an omnibus, running from their hotel, in the city of Macon. The trunk was placed in charge of the plaintiff's son, a youth about fourteen years old, at Columbus, and taken with him, as baggage, on coaches running from that city to Macon. At Macon, he staid a night at the defendants' house, and passed from thence in their omnibus, the next morning, to the Central Railroad depot. This baggage, including the lost trunk, was received by the defendants, at their hotel, and brought out by their servants, to be sent to the depot with him. Upon arriving at the depot, it was found not to be with the baggage, and was finally lost. Having proven that the trunk belonged to him, and also its loss, and the facts above stated, the plaintiff offered to read the testimony of Mrs. Margaret Dibble, his wife, taken by commission, to prove that she packed the trunk—what were its contents, and their value. The defendants objected to the reading of her testimony, upon three grounds:

1. Because the plaintiff had not proved that the trunk had been delivered into the possession of the defendants.

2. Because the articles contained in the bill of parcels, annexed to the declaration, and which the evidence was offered to show, were in the trunk, were merchandise, and not such articles of necessity and convenience as travelers are accustomed to take with them, and for the loss of which alone the defendants are by law liable.

3. Because the evidence of a party to prove the contents of a trunk, in an action to charge a common carrier for its loss, is admissible only in case of spoliation being committed on the property of the plaintiff by the carrier, and as no spoliation was proven to have been committed by the defendants, the evidence was inadmissible.

Upon these grounds, the testimony was rejected, and they make the points brought up for review.

No objection was made to the evidence upon the score of Mrs. Dibble being the plaintiff's wife. The plaintiff in error in the record, and counsel on both sides, in the argument, treated the case as if the plaintiff in the action had himself been offered to prove the contents of the trunk and their value. The general rule is, that a wife is not a competent witness, in a suit where her husband is a party, for reasons which grow out of the relation of husband and wife. Her competency, in this

case, depends upon those principles which, in like cases, would make her husband, who is the party plaintiff in the action, himself a witness, to make out his case. We shall find that his competency, in just such a case as this, grows out of an overruling necessity. So hers. Without further remark upon the character of the witness, as the wife of the plaintiff, than that we considered her as not excepted to on the ground of that relation, I proceed to notice the three grounds of incompetency, taken in the bill of exceptions, and stated above, as I find them there stated.

The first is easily disposed of. If there was no delivery of the trunk to the defendants, if it is not proven to have come into their possession, there can be no recovery for the plaintiff. Reception of the trunk, as baggage, lies at the foundation of the plaintiff's right of action. Whilst this is true, I do not see what it has to do with the competency of Mrs. Dibble. If her testimony is admitted and no delivery is proven, it goes for nothing; for in that event it would be the duty of the court to instruct the jury that the plaintiff could not recover. Indeed, if that is not proven, no matter what else is proven, the plaintiff has not made out his case, and would be nonsuited. Again, there is no room for considering this question. The fact of delivery is for the jury to determine, if there is any evidence going to prove it. There is, in the record, evidence of delivery. It is proven that the defendants were the proprietors of the Washington Hall hotel, where young Dibble stopped, and that in that character they received both him and his baggage, including the trunk; and it is also proven that they were proprietors of the omnibus which conveyed him to the Central Railroad depot from their door. And it is further proven that the trunk, at the time when he entered the omnibus, was present in the hands of one of the servants waiting at their hotel; and also, that he (young Dibble) informed the servant that it was to go with him to the depot. I will not say that this testimony is positive demonstration that, in their character as proprietors of the omnibus, the trunk came into their hands, for it is not necessary so to say; but I will say that it is evidence going to show that they received it, and that is all that is necessary for my purpose. It was quite sufficient to carry the case to the jury on the fact of delivery. If so, we are not at liberty to inquire whether proof of delivery was first necessary to be made in order to the admissibility of Mrs. Dibble's testimony. The proof was made, and that is an end to this objection.

The third ground of objection which I next notice, because more appropriate to this stage in the argument, is that the exception upon which the evidence of the plaintiff is admissible to prove the contents of a trunk, in an action to charge a carrier for its loss, extends to cases only where the carrier is proven to have been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the plaintiff's goods, and is then only admissible when there is no other evidence to prove the damage. In no case is it admissible if there is other evidence of the damage at the command of the plaintiff. If there is none, then it is true that the spoliation being proved, the evidence of the party is admissible *in odium spoliatoris*. This rule is fully illustrated in the case of *Herman v. Drinkwater*, 1 Greenl. 27. There, a ship-master received on board of his vessel a trunk of goods to be carried to another port. On the passage he broke open the trunk and rifled it of its contents, and in an action by the owner of the goods, the plaintiff having proved, *aliunde*, the delivery of the trunk and its violation, was held competent to testify to the contents of the trunk: *Childrens v. Saxby*, 1 Vern. 207; S. C., 1 Eq. Cas. Ab. 229; Tait on Ev. 280; 1 Greenl. Ev., sec. 348.

The principle upon which the rule goes has been extended to the case of bailors, who have been permitted, in suits brought by themselves for the contents of trunks lost by the negligence of bailees, to prove their contents: *Clark v. Spence*, 10 Watts, 335; 1 Greenl. Ev., sec. 348. In such cases, growing out of the negligence of bailees, the idea of spoliation is excluded. Whilst, then, it is true, that because of the abhorrence which the law has for acts of spoliation, the evidence of a party is admissible in his own case, yet it is true that there are other cases where, upon other grounds, a party may also testify.

"The oath *in litem*," says Professor Greenleaf, "is admitted in two classes of cases: 1. Where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages; and, 2. Where, on general grounds of public policy, it is deemed essential to the purposes of justice." 1 Greenl. Ev., sec. 348. Again, in speaking of the admissibility of a bailor suing for the value of goods lost by the negligence of the bailee, the same learned writer says: "Such evidence is admitted, not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but

also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected—it not being usual, even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers or to provide other evidence of their value. For where the law can have no force but by the evidence of the person interested, there the rules of the common law respecting evidence in general are presumed to be laid aside; or rather the subordinate are silenced by the most transcendent and universal rule, that, in all cases, that evidence is good, than which the nature of the subject presumes none better to be attainable:” 1 Greenl. Ev., sec. 348. The necessity of the case and the nature of the subject are, therefore, grounds upon which the evidence of a bailor who is a party may be admitted to prove the contents of a lost trunk. Upon these grounds, we rule that the evidence in this case ought to have been admitted. This rule received an enlightened exposition in the case before referred to, of *Clark v. Spence*, 10 Watts, 335. In that case Judge Rogers remarks: “A party is not competent to testify in his own case, but, like every other general rule, this has exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence.”

In 12 Vin. Abr. 24, pl. 34, it is laid down, that on a trial at Bodneys *coram* Montague, B., against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness, *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognized in decisions on the statute of Hue and Cry, in England, where a party robbed is admitted, *ex necessitate*. That a party, then, can be admitted, under certain circumstances, to prove the contents of a box or trunk, must be admitted, etc. I then assume, upon authority, that the party's admissibility does not depend upon the fact of spoliation alone, but that he is admissible to prove the contents of a trunk, when no other evidence is attainable, upon the ground of a policy *in favorem justitiae*, springing out of the necessity of the case and the nature of the subject. Equally is the assumption sustainable upon principle; for, as argued by Greenleaf, all subordinate rules of evidence are silenced by that universal and transcendent rule, that that evidence in all cases is good, than which the nature of the subject presumes none better to be attainable. Justice has her necessities, one of which is, that wrong must be prevented, even by overriding rules of evidence, which are ordinarily not only salutary, but indispensable. The rule is appli-

cable to this case. It is not pretended that there is any evidence attainable to prove the contents of this trunk but that of Mrs. Dibble. She packed it, and she alone knew its contents. The necessity of her admission, then, is found in the fact which clearly appears on the face of this record, that if she is excluded, the plaintiff loses his rights. The reason of the rule is fortified by a consideration of the confidence and trust which the public are obliged to repose in carriers, and the facility with which that confidence may be abused: *Lane v. Cotton*, 1 Vin. Abr. 219; S. C., 1 Salk. 143.

The second ground of objection to Mrs. Dibble's testimony involves a question of some difficulty and of great practical importance; and it is this, to wit: how far the rule admitting the evidence of a party is limited by that kind of liability which the law has imposed upon stage contractors, railroad companies, omnibus proprietors, and others who carry passengers, for the loss of their baggage. The point, then, resolves itself into the inquiry, For what articles in a trunk, accompanying a traveler as baggage, is the carrier liable? The question is mooted in the books whether such persons, as regards baggage accompanying travelers, are liable as common carriers, or as private persons engaging to carry for hire. If the former, they are liable as insurers against loss, except when occasioned by the act of God and the public enemies; and if the latter, they are bound only to due and reasonable skill and diligence in their undertaking.

It is, however, now well settled, that they are liable for baggage as common carriers. Without other compensation than the fare for passengers, they are liable for their baggage, as common carriers are liable for goods delivered to them for transportation; that is, they are liable for baggage at all events, except when destroyed by the act of God, or irresistible accident and the public enemies: *Brooke v. Pickwick*, 4 Bing. 218, 222; *Christie v. Griggs*, 2 Camp. 79; *Allen v. Sewall*, 2 Wend. 327, 341; *Sewall v. Allen*, 6 Id. 335; *Clarke v. Gray*, 6 East, 564; *Camden etc. T. Co. v. Burke*, 13 Wend. 611, 627, 628 [28 Am. Dec. 488]; *Orange County Bank v. Brown*, 9 Id. 85, 114-119 [24 Am. Dec. 129]; *Hollister v. Nowlen*, 19 Id. 234 [32 Am. Dec. 455]; 2 Kent's Com., 4th ed., 600, 601; 1 Bell's Com., 8th ed., 467, 468, 475; Story on Bail., sec. 449.

It remains, however, to inquire what is to be understood by baggage for which they are thus liable. And we are not guided in this inquiry by adjudications which settle a definite rule of universal application. From their usual course of business,

when they carry a passenger, a contract is implied to carry also his baggage. They are presumed to be compensated in the fare for his transportation, and I can very well believe well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying baggage, and would be lessened, if for his baggage a passenger was required to pay freight. It is curious to remark, as I do *en passant*, that the law takes more care of a man's luggage than it does of his life and limbs; for the former, the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence. But to return: to what articles, under the denomination of baggage, does this implied contract extend?

Judge Story informs us that "by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like:" Story on Bail., sec. 499. In *Orange County Bank v. Brown*, 9 Wend. 115 [24 Am. Dec. 129], Judge Nelson says: "A reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but courts ought not to permit this gratuity or custom to be abused, and, under pretense of baggage, to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards." In *Hawkins v. Hoffman*, 6 Hill, 589 [41 Am. Dec. 767], Bronson, J., says: "An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication can not be extended a single step beyond such things as the traveler usually has with him as part of his luggage. It is doubtless difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men may carry nothing or very little with them when they travel, whilst others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they

would undoubtedly fall within the term 'baggage,' because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule."

It has been decided that under the term "baggage," merchandise, as silks or other fine articles, are not embraced: *Pardee v. Drew*, 25 Wend. 458; nor large sums of money: *Orange County Bank v. Brown*, *supra*; nor samples of merchandise: *Hawkins v. Hoffman*, *supra*. A watch is embraced according to the Ohio courts: *Jones v. Voorhees*, 10 Ohio, 145. So far as these rulings go, the doctrine may be considered as settled, and it must be considered as settled in all cases falling within the reason of those rulings. When, however, all this is done, the subject is disincumbered of but little of the difficulty which environs it.

Nor do the text of Story nor the opinions of Judges Nelson and Bronson relieve it of embarrassment. When we settle down with Judge Story upon the proposition that by baggage is to be understood "such articles of necessity or personal convenience as are usually carried by passengers for their personal use," we are still without a rule for determining what articles are included in baggage. For such things as would be necessary to one man would not be necessary to another; articles which would be held but ordinary conveniences by A. might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs perhaps a portmanteau, a change of linen, and an indifferent razor; whilst another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveler—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone or with a family. If we agree further with Judge Story, and say that the articles of necessity or of convenience must be such as are usually carried by travelers for their personal use, we are still at fault, because there is in no state of this Union, nor in any part of any one state, any settled usage as to the baggage which travelers carry with them for their personal use. The quantity and character of baggage found to accompany passengers are as various as are the countenances of the travelers.

The negative part of Judge Story's definition, with more precision, furnishes a rule *pro tanto*. Baggage, he says, does not embrace merchandise, nor other valuables not designed for personal use, but which are designed for other purposes, such as a

sale, or the like. We may safely say that it does not embrace merchandise or other articles which are intended to be sold. But it is not to be understood, I apprehend, that no article is embraced which may be classed with merchandise, or which is a valuable, other than such as is usual for personal use. Regard must be had to the quantity and value of the articles. A trunk of laces, for instance, although light and small in bulk, clearly is excluded. Their value would exclude them. The risk imposed upon the carrier is not that contemplated in the implied contract to carry baggage, and to be responsible for it. The liability in such a case would be wholly disproportioned to the compensation which he is presumed to derive from the fare of passengers. Besides, it is a fraud upon him to subject him to so great a hazard without warning him of its existence.

As to extra baggage, the proprietors of railroads, steamboats, coaches, and omnibuses, etc., engaged in the business of conveying passengers, have the right to stipulate for compensation. So, also, in regard to goods and baggage, which do not accompany the traveler or his agent; and if they hold themselves out to the public as persons exercising a public employment, and as being ready to carry goods for hire for persons in general, as to such goods and extra baggage they are common carriers; that is, they are liable for loss, except when caused by the act of God and the public enemy: *Lovett v. Hobbs*, 2 Show. 128; *Middleton v. Fowler*, 1 Salk. 282; *Dwight v. Brewster*, 1 Pick. 50 [11 Am. Dec. 133]; *Allen v. Sewall*, 2 Wend. 327; S. C., *sub nom. Sewall v. Allen*, 6 Id. 335; *Orange County Bank v. Brown*, 9 Id. 85 [24 Am. Dec. 129]; *Hastings v. Pepper*, 11 Pick. 41; *Story on Bail.*, sec. 500; *Shelden v. Robinson*, 7 N. H. 157 [26 Am. Dec. 726].

So all articles of a value disproportioned to the compensation received in the fare of the passenger, and which must, on that account, subject the carrier to unreasonable hazard, and which are not presumed to be needed for personal use, either as a necessary or a convenience, I would suppose, are in like manner excluded. At the same time, I must say that the obligation of the carrier, which is incidental to and implied from his contract to carry persons for hire, as to baggage is not limited absolutely to wearing apparel and other appliances of necessity, comfort, or convenience, suited to the condition of each traveler, but may embrace other articles of limited value and ordinary bulk, which he may think proper to take with him. If, however, it is apparent from all the circumstances—from the

amount, nature, bulk, and value of these articles—that they are such as, according to the usual course of business, are transported as freight, or if it is manifest that they are intended for sale, then they are not to be viewed in the light of baggage. It is certainly right, too, that usage, however indeterminate, should be considered in ascertaining what is baggage. This must be the usage of the time, and of the carrier and his patrons. Nothing subject to the limitations before stated should be excluded which have been usually considered in practice as baggage. These remarks are made, not as containing the judgment of the court, which prescribes them as rules, but as my own *obiter dicta*. Among other things, they are intended to demonstrate the utter impossibility of laying down any rule which can govern every case. And it is our judgment, that no such rule can be prescribed, but that each case must be controlled under the general principles which apply to the class, by the facts and circumstances which belong to it; the application of those principles to each case being the duty of the court, and the finding of the facts being the duty of the jury.

Under these views, we admit the evidence of Mrs. Dibble, to the extent of proving the contents of the trunk, according to the bill of particulars. The only question made is a question of evidence. As I have endeavored to show, the witness is competent. We will not exclude her upon the ground that defendants are not liable for baggage, according to this bill of particulars; although her testimony will amount to nothing in proof of articles for which they are not in law bound. The bill of particulars shows a great variety of articles; some of which, indeed many of which, constitute baggage, according to the strictest ruling to be found in the books. For these, the plaintiff is entitled to recover. No ruling of the court below and no exception in the bill makes it necessary to designate them. The court ruled out the evidence, because, as he said, the trunk and its contents “were *sui generis*, and not within the rule.” Now, although the contents of the trunk are various, yet some of them are such articles as the defendants are bound to make good; and therefore, it was error not to permit them to be proved. It is not good law to hold that a passenger can not recover for loss of baggage for which the defendants are liable because he had also in his trunk articles for which they are not liable. The evidence must go to the jury, and the extent of the recovery must be left with them, under the instructions of the court.

Let the judgment be reversed.

DELIVERY OF GOODS TO CARRIER, NECESSITY AND SUFFICIENCY OF, to make him responsible for their safety: See *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 344, and note.

LIABILITY OF PASSENGER CARRIER FOR BAGGAGE OF PASSENGERS: See *Jordan v. Fall River R. R. Co.*, 51 Am. Dec. 44; *Bomar v. Maxwell*, Id. 682; *Camden etc. R. R. Co. v. Baldauf*, 55 Id. 481, and notes. In *Sasseen v. Clark*, 37 Ga. 250, the principal case is cited to the point that passenger carriers are liable for the safety of baggage of passengers without other compensation than the fare paid by such passengers, and the case of an innkeeper is said to be analogous.

BAGGAGE, WHAT CONSTITUTES: See *Jordan v. Fall River R. R. Co.*, 51 Am. Dec. 44; *Bomar v. Maxwell*, Id. 682; *Camden etc. R. R. Co. v. Baldauf*, 55 Id. 481, and notes thereto. That other articles than wearing apparel which contribute to the comfort or amusement of a passenger may be included in the term "baggage" is a point to which the principal case is cited in *Hutchings v. Western etc. R. R.*, 25 Ga. 64.

COMPETENCY OF TESTIMONY OF OWNER OF TRUNK lost by a carrier, or of the wife of such owner as to the contents of the trunk: See *McGill v. Rowand*, 45 Am. Dec. 654. That the testimony of the owner of the trunk is admissible to prove its contents in such a case, if there is no other evidence, is a point to which *Dibble v. Brown* is cited in *McNabb v. Lockhart*, 18 Ga. 510.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

GALENA & CHICAGO U. R. R. Co. v. LOOMIS.

[13 ILLINOIS, 548.]

LEGISLATURE HAS POWER TO REGULATE CORPORATIONS in the exercise of their franchises, so as to provide for the public safety, by the enactment of general laws from time to time, as the public exigencies may require. CORPORATION IS AS MUCH SUBJECT TO GENERAL POLICE LAWS OF STATE as is an individual pursuing his lawful business.

GENERAL LAW REQUIRING BELL OR WHISTLE TO BE ATTACHED TO EACH LOCOMOTIVE ENGINE of a railroad company, and to be rung or whistled before crossing any other road, is applicable to and binding on a corporation created prior to its passage; and an omission to give the required signal is *prima facie* proof of negligence on the part of such corporation.

RAILROAD CORPORATIONS ARE NOT LIABLE FOR ANY AND ALL DAMAGES that a person may sustain, when they have omitted to give a signal required by law. Until some proof is given tending to show that the injury resulted from a failure to give such signal, the burden of proving that it did not arise from such failure is not thrown upon the corporation.

APPEAL from Cook county court. The opinion states the case.

J. H. Collins, for the appellants.

Larned and Woodbridge, for the appellee.

By Court, TRUMBULL, J. This was an action of trespass on the case, brought to recover damages alleged to have been sustained by the plaintiff, in consequence of the careless and improper management by the defendants of their railroad cars and locomotive engine. Plea, not guilty.

It appears from the evidence, that in December, 1850, about six o'clock in the evening, the plaintiff was traveling in a wagon drawn by two horses, near the railroad crossing on the turnpike leading west from Chicago; that the locomotive engine and cars

of the defendants were at the same time going towards Chicago, and near the place where the roads cross; that the two roads run nearly parallel for a number of rods before they cross; that the defendants failed to ring a bell or sound a whistle as the train of cars approached the crossing; that the plaintiff drove across the railroad track immediately before and within a few feet of the locomotive; that his horses became frightened at the engine and cars, ran into the railroad ditch, upset the wagon, ran off, and were lost; and that the plaintiff himself was considerably bruised.

The jury returned a verdict of two hundred dollars against the defendants, and the plaintiff had judgment thereon.

At the request of the plaintiff, the court, among other instructions to the jury, gave the following: "If the jury believe, from the evidence, that the defendants omitted to ring a bell or sound a whistle, in the manner required by law, such omission constitutes a *prima facie* case of negligence, and the defendants are liable to the plaintiff for the loss and damage proved to have been sustained by him, unless the defendants proved that such loss and damage were not occasioned by such omission."

The defendants object to the first branch of this instruction, that there is no law requiring them to have a bell or whistle attached to their locomotive engines. It is admitted that their charter, as originally passed, contains no such requirements; but by the thirty-eighth section of a general law subsequently enacted, entitled "An act to provide for a general system of railroad incorporations," approved March 5, 1849, it is declared that "a bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one half thereof to go to the informer and the other half to the state, and shall be liable for all damages which shall be sustained by any person by reason of such neglect;" and the forty-fifth section of the same act declares that "all existing railroad corporations within this state shall respectively have and possess all the powers and privileges, and be subject to the duties and liabilities and provisions, contained in this act, so far as they shall be applicable to their present conditions, and not inconsistent with their several charters."

That the provisions of the thirty-eighth section are applicable to the present condition of the road of the defendants does not admit of question; and that they are not inconsistent with any provision of their charter is equally certain. They are, therefore, bound by these requirements of the law, unless, as has been suggested, the legislature had no authority to impose them.

That the legislature has the power, by the enactment of general laws from time to time, as the public exigencies may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety, admits of no doubt. The provision in question is a mere police regulation, enacted for the protection and safety of the citizens of the country, and in no matter interferes with or impairs the powers conferred on the defendants in their act of incorporation. There is nothing in the character of this or any other charter so sacred as to shield the corporators from punishment for criminal offenses committed in the exercise of their corporate powers. Nor is the corporation itself above the general laws enacted for the safety of the community.

The act of corporation confers on the company certain privileges; but in the exercise of those privileges the corporation is just as much subject to the general police laws of the state as is an individual pursuing his lawful business: *Stuyvesant v. Mayor etc. of New York*, 7 Cow. 603; *Baker v. Boston*, 12 Pick. 184 [22 Am. Dec. 421]; Angell & Ames on Corp. 427, 428.

There can be no question that the general law requiring a bell or whistle to be attached to each locomotive engine, which shall be rung or whistled before crossing any other road, is applicable to and binding on the defendants in this case; and that an omission to give the required signal constitutes a *prima facie* case of negligence.

So far, the instruction was clearly right; but the other branch of it was, we think, erroneous. It implies that railroad corporations are liable, *prima facie*, for any and all damages a party may sustain when they have omitted to give the signal required by law, whether such damages were sustained by reason of such neglect or from any other cause. The party himself may have been guilty of negligence; or the circumstances may be such as to show no probable connection between the injury sustained and the omission to give the requisite signal; and, in such cases, it would be requiring too much to compel the company to prove affirmatively that the damage was not occasioned by

such omission. Until some proof is given, tending to show that the injury resulted from a failure to ring a bell or blow a whistle, the burden of proving a negative, and that it did not arise from such failure, should not be thrown on the company.

Judgment reversed, and cause remanded.

Judgment reversed.

LEGISLATURE HAS POWER BY ENACTMENT OF GENERAL LAWS from time to time, as the exigencies may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety: *Chicago, B. & Q. R. R. Co. v. Parks*, 18 Ill. 468; *Dingman v. People*, 51 Id. 280; *Toledo, P. & W. R. Co. v. Deacon*, 63 Id. 94; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Id. 40; *Chicago, B. & Q. R. R. Co. v. Haggerty*, Id. 116; *Lake View v. Rose Hill Cem. Co.*, 70 Id. 194; *Ruggles v. People*, 91 Id. 261.

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF DEFEATS RIGHT OF ACTION: See *Munger v. Tonawanda R. R. Co.*, 53 Am. Dec. 384, note 387, where other cases are collected; *Chicago & M. R. R. Co. v. Patchin*, 16 Ill. 202; *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 291, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Illinois Cent. R. R. Co. v. Gillis*, 68 Ill. 318, to the point that the omission of a railroad company to ring a bell, as required by statute, is *prima facie* negligence; in *Chicago & A. R. R. Co. v. McDaniels*, 63 Id. 125, to the point that such omission subjects the company to a penalty, but does not render it liable in an action for damages unless the damages were sustained by reason of such negligence; and in *Indianapolis & St. L. R. R. Co. v. Blackman*, 63 Id. 120; and in *Bellefontaine R. Co. v. Hunter*, 33 Ind. 362, to the point that the omission of a railroad company to give a signal is not of itself evidence of negligence, but the jury must determine the effect of the omission or neglect.

KELLEY v. HEMMINGWAY.

[13 ILLINOIS, 604.]

NOTE PAYABLE TO PERSON "WHEN HE IS TWENTY-ONE YEARS OLD" is not a promissory note, negotiable under the Illinois statute. The contingency upon which such note is made payable may never happen, and therefore it is not certainly and at all events payable.

INSTRUMENT WHICH IS NOT PROMISSORY NOTE WHEN MADE can not become such by matter *ex post facto*.

APPEAL from Du Page circuit court. The opinion states the case.

Farnsworth and Ferguson, and T. L. Dickey, for the appellant.

Glover and Cook, for the appellee.

By Court, TREAT, C. J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken

by appeal to the circuit court. On the trial in the latter court the plaintiff offered in evidence an instrument in these words:

“CASTLETON, April 27, 1844.

“Due Henry D. Kelley fifty-three dollars when he is twenty-one years old, with interest. DAVID KELLEY.”

On the back of which was this indorsement:

“ROCKTON, May 21, 1849.

“Signed the within, payable to Moses Hemmingway.

“HENRY KELLEY.”

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument, because it was not negotiable, but the court admitted it in evidence, and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it can not be considered as a promissory note: Ch. Bills, 134. Thus, a promise in writing to pay a sum of money when a particular person shall be married is not a promissory note, because it is not certain that he will ever be married: *Pearson v. Garrett*, 4 Mod. 242; *Beardsley v. Baldwin*, 2 Stra. 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return: *Palmer v. Pratt*, 2 Bing. 185; *Coolidge v. Ruggles*, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will certainly transpire: *Colchan v. Cooke*, Willes, 393; S. C., 2 Stra. 1217.

In this case the payment was to be made when the payee should attain his majority—an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute.

The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of *Goss v. Nelson*, 1 Burr. 226, is clearly distinguishable from the present. There, the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time or die in the interim; and it was distinctly intimated that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed.

Judgment reversed.

TEST OF NEGOTIABILITY of a note is, that it must be an undertaking to pay a certain sum at all events, at some time which must certainly come; *Worden v. Dodge*, 47 Am. Dec. 247, note 248, and cases there collected; *Smalley v. Edey*, 15 Ill. 325; *Gillilan v. Myers*, 31 Id. 528; *Kingsbury v. Wall*, 68 Id. 312; *Baird v. Underwood*, 74 Id. 177; *Husband v. Epling*, 81 Id. 174, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Bilderback v. Burlingame*, 27 Ill. 342.

JENNINGS v. GAGE.

[13 ILLINOIS, 610.]

PARTY CAN NOT RESCIND CONTRACT AND AT SAME TIME RETAIN CONSIDERATION, in whole or in part, which he has received under it. He must rescind the contract *in toto* or not at all.

VENDEE OF GOODS MERELY CONTRACTED TO BE SOLD, but never actually delivered, has no right to the possession of them until the sale is consummated, and if, before consummation of the sale, he obtains possession surreptitiously, and without the consent of the vendor, the latter may recover it again without a rescission of the contract.

IN CASE OF SALE AND DELIVERY OF GOODS TITLE PASSES TO VENDEE, but in case of a mere contract for a sale, the title remains with the original owner.

RETURN OF CONSIDERATION IS NECESSARY ONLY WHEN VENDOR SEEKS TO AVOID the contract under which he has parted with his goods.

GOOD FAITH OF TRANSACTION IS MATTER PECULIARLY APPROPRIATE for the consideration of the jury.

WHERE OWNER OF GOODS, BY VOLUNTARILY PARTING WITH POSSESSION THEREOF, clothes a vendee with the *indicia* of ownership, he must bear the loss, as between him and an innocent purchaser from such vendee. But this principle does not apply to sales upon condition, and where the original owner has never consented to the transfer of the property.

OWNER OF PERSONAL PROPERTY CAN NOT BE DIVESTED OF IT without his consent; but if he consent to its transfer, though such consent be only temporary and obtained by fraud, and therefore revocable as against such unfair purchaser, yet an honest purchaser from him will be protected, and the first owner must bear the loss.

ERROR to Cook. The opinion states the case,

Arnold and Lay, for the plaintiff in error.

G. Goodrich, for the defendants in error.

By Court, TRUMBULL, J. Gage, Dater & Massey, merchants in the city of New York, sold to Van Valin a bill of goods, taking in payment his notes, at four, six, and nine months, secured by a mortgage on real estate in Wisconsin. The goods to be shipped to Chicago, but not to be delivered to Van Valin till he gave an indorser on the notes satisfactory to J. H. Burch. The goods were accordingly forwarded to Van Valin, care of James Peck & Co., warehousemen, Chicago, who were instructed by Burch not to deliver them without directions from him. Van Valin, however, paid the charges and obtained the possession of the goods without giving the indorser, and subsequently sold them to Jennings, the defendant in the court below.

Gage, Dater & Co. demanded the goods of Jennings, and on his refusal to deliver them brought trover for their value, and recovered a judgment for one thousand three hundred and thirty-nine dollars and seventy-four cents.

Among other instructions, the defendant asked the court to give to the jury the following: "If the jury believe that plaintiffs in this case contracted to sell the bill of goods sued for in this case to Henry Van Valin, defendant's vendor, and received the notes of Van Valin, part secured by mortgage on property in Wisconsin and the balance to be secured by a good indorser, or that an indorser in addition to the security given by mortgage was to be given for the whole amount of the goods, still if the mortgage was given by Van Valin before the plaintiffs would be entitled to recover of the defendant, the plaintiffs must show that they have restored the mortgage or canceled the same, or offered

to cancel the same, and if they have not done either, the law is with the defendant."

"If the jury believe, from the evidence, that Jennings purchased the goods in good faith of Van Valin, and that at the time of such purchase Van Valin had actual possession of such goods, and that they were marked in New York by plaintiffs with Van Valin's name, and transmitted to him at Chicago, and there actually delivered to him by the plaintiffs' agent and consignee, then as against Jennings the plaintiffs can not recover."

The first of the above instructions the court refused to give, and gave the second with this qualification: "If, however, the agreement between the plaintiffs and Van Valin was that the goods were only to be delivered to Van Valin upon the condition of his giving security for the price, then if the possession was obtained by Van Valin without giving the security agreed upon and in violation of the agreement, then he derived no title to the goods which he could sell to Jennings, even if Jennings was a purchaser in good faith and for a valuable consideration."

The refusal to give the first instruction, and the giving of the other with the qualification, present the only questions arising in the case.

It is a rule that a party can not rescind a contract, and at the same time retain the consideration, in whole or in part, which he has received under it. He must rescind the contract *in toto* or not at all: *Hogan v. Weyer*, 5 Hill, 390; *Moyer v. Shoemaker*, 5 Barb. 322; *Buchenau v. Horney*, 12 Ill. 336.

The first of defendant's instructions was not, however, based upon the supposition that Van Valin received the goods under the contract of purchase, and unless he did so receive them, that instruction and several others of precisely similar character were properly refused as inapplicable to the facts of this case.

If the goods were simply contracted to Van Valin but never actually sold and delivered to him, he had no right to the possession till such contract was consummated; and if, under such circumstances, he obtained the possession surreptitiously and without the consent of the plaintiffs, they could recover it again without a rescission of the contract.

There is a material distinction between a sale and delivery of goods and a mere contract for a sale. In the one case, the title to the goods passes to the vendee; in the other, it remains with the original owner. Upon the hypothesis assumed in the instruction, that the goods were merely contracted to be sold to Van Valin, as applied to the facts of this case, it is clear that

the title to the property was not changed, and the plaintiffs had the right, without the rescission of a contract which did not change the title to the goods, to recover their possession or value against one who had wrongfully taken them away.

It is only when the vendor seeks to avoid the contract under which he has parted with his goods that a return of the consideration he has received under such contract becomes necessary.

The right to recover in this case, upon the supposition that there was simply a contract for the sale of the goods, which were not to be delivered except further security was given, did not depend on the rescission of such contract; hence it was unnecessary that the plaintiffs, before bringing suit, should have canceled the mortgage which had been given in part security for the price of the goods, as they were not seeking to avoid the contract for their sale or to recover in opposition to it, and defendant's instructions upon this branch of the law were properly refused as inapplicable to the case.

The questions of law arising upon the other instruction, and the qualification annexed, are of a different character. That instruction is based on the supposition that Jennings was a purchaser of the goods in good faith and for a valuable consideration. Whether the evidence would have justified the jury in finding that he was such a purchaser is not now the question. The good faith of the transaction was a matter peculiarly appropriate for the consideration of the jury, and as such the defendant had the right to have it submitted to and passed upon by them.

As between plaintiffs and Van Valin, there is no question that the title to the goods would not pass on the state of case supposed in the instruction; but it is insisted that as between the plaintiffs and Jennings the law is different, and that as between them, both parties being innocent, the loss should fall upon the owners, who, by intrusting Van Valin with the possession of the goods, enabled him to commit the fraud, rather than upon Jennings, who is presumed to have acted in good faith and with proper caution. This is unquestionably the law where the owners, with the intention of sale, have voluntarily parted with the possession of the goods, and clothed the vendee with the *indicia* of ownership, though under such circumstances as would authorize a rescission of the sale and a recovery of the goods as against the vendee: *Mowrey v. Walsh*, 8 Cow. 238; *Rowley v. Bigelow*, 12 Pick. 307 [23 Am. Dec. 607]. But this principle

does not apply to sales upon condition and where the original owner has never consented to the transfer of the property: *Bradeen v. Brooks*, 22 Me. 463; *Dresser Manufacturing Co. v. Waterston*, 3 Met. 9; 2 Kent's Com. 497. It is a universal and fundamental principle of the law of personal property that no man can be divested of it without his own consent: *Saltus v. Everett*, 20 Wend. 275 [32 Am. Dec. 541]; *Ash v. Putnam*, 1 Hill (N. Y.), 303. If he consent to the transfer of the property, though such consent be temporary only, and obtained by fraud, and therefore revocable as against such unfair purchaser, still an honest purchaser from him will be protected, and the first owner must bear the loss. Does the instruction, as qualified by the court, exclude the idea of Van Valin having obtained possession of the goods by the consent of the plaintiffs? If it does, the instruction was correct, otherwise it was erroneous. A moment's consideration will show that all the facts stated hypothetically in the qualification may be true, and still Van Valin may have got the possession of the goods temporarily by the consent of the plaintiffs. He may have obtained the possession under the false and fraudulent promise that he would afterwards furnish the security, or he may even have furnished an indorser upon the notes satisfactory to Burch, when in fact the signature of the indorser was forged; and there are many ways in which it is possible that he may fraudulently have obtained possession of the goods without giving the security agreed upon, and in violation of his agreement, and yet by the plaintiffs' consent, for the time being. Under such circumstances, a *bona fide* purchaser from Van Valin would be protected.

The qualification of the instruction was therefore erroneous, and the judgment must for that reason be reversed.

Judgment reversed, and cause remanded.

Judgment reversed.

TITLE TO PERSONAL PROPERTY DOES NOT PASS TO VENDEE WITHOUT DELIVERY: See *Golder v. Ogden*, 53 Am. Dec. 618, note 619, where other cases are collected.

RESCISSION OF CONTRACT: See *Fay v. Oliver*, 49 Am. Dec. 764, note 768, where other cases are collected.

BONA FIDE PURCHASER FROM FRAUDULENT VENDEE GETS GOOD TITLE: See *Hoffman v. Noble*, 39 Am. Dec. 711, note 716, where other cases are collected. Where a party has voluntarily parted with his goods, and given to the vendee a title thereto, he can not reclaim them from a third person who has become a *bona fide* purchaser from such vendee: *Bell v. Cafferty*, 21 Ind. 420; *Brundage v. Camp*, 21 Ill. 334; *Fawcett v. Osborn*, 32 Id. 424, 427; *Burton v. Curryea*, 40 Id. 330; *Ohio & Miss. R. Co. v. Kerr*, 49 Id. 459; *Michigan Cent.*

R. R. Co. v. Phillips, 60 Id. 194; *Western U. R. R. Co. v. Wagner*, 65 Id. 199; *Young v. Bradley*, 68 Id. 557; *Schweizer v. Tracy*, 76 Id. 349; *Van Duzor v. Allen*, 90 Id. 502, all citing the principal case.

CREDITORS WHO, TO SECURE DEBT, TAKE TITLE BY PURCHASE FROM FRAUDULENT VENDEE, with knowledge of his title, take only such title as their vendee had, and other creditors may assail the whole transaction for fraud: *Waggoner v. Cooley*, 17 Ill. 245, citing the principal case.

CARROLL v. WELD.

[13 ILLINOIS, 682.]

ONE WHO PUTS HIS NAME ON BACK OF NOTE before it is delivered to the payee is an original party to the note, and the original consideration for the note is the consideration for his undertaking. It is not necessary that he shall participate in or receive any part of the consideration.

WHERE NAME OF PARTY IS FOUND ON BACK OF NOTE, in the hands of the payee, the presumption of law is that it was put there at the time of the execution, and in the absence of proof to the contrary, the law presumes that he assumed to guarantee the note.

ERROR to the Cook county court of common pleas. The facts are stated in the opinion.

J. E. Dillon, for the plaintiff in error.

J. N. Arnold, for the defendant in error.

By Court, CATON, J. Prickett & Hawkins executed their note to Weld for the purchase of some goods. He, not being satisfied with their responsibility, refused to take the note unless Carroll signed it with them. Carroll then put his name on the back of the note, when it was delivered to the payee. Here Carroll was an original party to the note, and the original consideration for the note was the consideration for his undertaking. It was not necessary that he should participate in or receive any part of the consideration. His undertaking induced the payee to accept the note in payment of the goods sold, and that was sufficient. The only question which was seriously urged upon our consideration in the argument was as to the character and nature of the liability assumed by Carroll. He was sued as guarantor of the note, and now he insists that he only assumed the liability of second indorser. This is a question which has been long since settled in this court, and we see no cause to limit the liability as there established. In the case of *Camden v. McKoy*, 3 Scam. 437 [38 Am. Dec. 91], it was held that where the name of a party is found on the back of a note in the hands of the payee, the presumption of law is that it was put there at

the time of the execution of the note, and that, in the absence of proof to the contrary, it is a further presumption that he assumed to guarantee the note; and in the subsequent case of *Cushman v. Dement*, Id. 497, the same rule was adopted and enforced. In these cases it was also decided that these presumptions might be rebutted by proof showing the actual character of the transaction. In this case there is proof sustaining these presumptions of law, or rather showing that the understanding, at least on the part of the payee of the note, was, that the liability of Carroll should be even more than that of a guarantor; for he required that Carroll should become a surety in the note. In the two cases referred to, this court followed the decisions of the supreme courts of New York and Massachusetts, as well as those of several other distinguished tribunals; and now we are asked to retrace our steps because a different rule for a time prevailed in New York. We have examined the several decisions of the case of *Hall v. Newcomb*, 3 Hill (N. Y.), 233; and S. C., 7 Id. 416 [42 Am. Dec. 82], and find nothing in them which inclines us to change the rule in this court. The last was in the court of errors, where the case was twice argued. Upon the first argument, that court was equally divided; and upon the second argument, a very large minority of the court were for adhering to the ancient and true rule upon the subject. In the cases already referred to in this court, the subject was fully examined, and we do not feel called upon to review the authorities again.

Let the judgment be affirmed.

Judgment affirmed.

ONE WHO PUTS HIS NAME ON BACK OF NOTE at the time of its inception is an original promisor: *Colburn v. Averill*, 50 Am. Dec. 630, note 632, where other cases are collected. See also *Sylvester v. Downer*, 49 Id. 786, and note 790.

SIGNATURE OF THIRD PERSON ON BACK OF NOTE, while in the hands of the payee, is presumptive evidence that it was placed there at the time of the execution of the note: *Webster v. Cobb*, 17 Ill. 465; *Blatchford v. Milliken*, 35 Id. 439; *White v. Weaver*, 41 Id. 413; *Gridley v. Capen*, 72 Id. 13, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Rich v. Hathaway*, 18 Ill. 549, to the point that a guaranty is an original independent undertaking.

WOODS v. DEVIN.

[13 ILLINOIS, 747.]

COMMON CARRIER OF PASSENGERS BECOMES RESPONSIBLE FOR LOSS OF BAGGAGE of a passenger as soon as it is delivered to him, although such passenger may not have prepaid his fare.

LOSS BY THEFT IS NOT WITHIN EITHER OF EXCEPTIONS to the risk of a common carrier.

POCKET-PISTOL AND PAIR OF DUELING-PISTOLS CARRIED BY PASSENGER in a carpet-bag, for his personal use and protection, form part of his baggage, for the loss of which a common carrier is liable.

ERROR to the circuit court of Peoria county. The opinion states the case.

H. O. Merriman, for the plaintiff in error.

N. H. Purple, for the defendant in error.

By Court, TREAT, C. J. This was an action on the case brought by Devin against Woods. The declaration alleged in substance that the plaintiff, on the seventh of August, 1851, delivered on board the steamboat Governor Briggs, then lying at Peoria, and owned by the defendant and used by him in the transportation of passengers and freight on the Illinois river between Peoria and La Salle, a carpet-bag containing one case of dueling-pistols, one pocket-pistol, and various articles of wearing apparel of the value of two hundred dollars, to be carried on said boat from Peoria to La Salle for a certain reward, and that the defendant received the same for the purpose aforesaid; yet the defendant, not regarding his duty in the premises, did not deliver the carpet-bag and contents at La Salle, but, on the contrary, lost the same. The plea was, not guilty.

It appeared in evidence that on the seventh of August, 1851, the plaintiff was about to take a journey from Peoria to the city of New York, and engaged his passage for La Salle in the steamboat Governor Briggs, then owned by the defendant, and run by him on the Illinois river between Peoria and La Salle for the conveyance of passengers and freight; that the plaintiff sent his trunk and carpet-bag to the boat as she was about to leave Peoria for La Salle, and the same were received on board by the direction of the defendant; that the plaintiff left the boat temporarily, and while absent on shore the carpet-bag was stolen and rifled of its contents, and the same were never recovered by him; that he did not proceed on his journey, in consequence of the loss of the carpet-bag; that the plaintiff did not pay his fare for the passage, nor was there any express contract

for the carriage of the trunk and carpet-bag; that the carpet-bag contained articles of wearing apparel of the value of thirty-six dollars, a pair of dueling-pistols of the value of twenty-five dollars, and a pocket-pistol of the value of fifteen dollars.

The court refused to give the following instructions asked by the defendant: "That if the carpet-bag was merely baggage as is usual for passengers to carry, and was designed as such by the plaintiff, the plaintiff can not recover under this declaration, and the jury will find for the defendant. If the carpet-bag was for the purpose and use of carrying clothing, etc., the plaintiff can not recover for the contents of the bag, except for such articles as are usually carried by travelers; and the jury are the judges whether or not the pistols mentioned are usually a portion of the baggage of a traveling gentleman, and if not, the jury will not allow any amount for the pistols."

The jury found the issue in favor of the plaintiff, and assessed his damages at seventy-three dollars and seventy-five cents. The court overruled a motion for a new trial, and gave judgment on the verdict.

A common carrier of passengers is responsible for the baggage of a passenger. His duty in this respect is the same as that of a common carrier of goods; and he can only excuse himself for the non-delivery of the baggage of a passenger by showing that it was lost by the act of God or of the public enemy. His responsibility commences when the baggage is delivered to him or his authorized agent: *Camden and Amboy Railroad v. Belknap*, 21 Wend. 354. His compensation for carrying the baggage is included in the fare of the passenger: *The Orange County Bank v. Brown*, 9 Id. 85 [24 Am. Dec. 129]; *Hawkins v. Hoffman*, 6 Hill, 586 [41 Am. Dec. 767]. Prepayment of the fare is not necessary in order to charge the carrier for the loss of the baggage: *The Citizens' Bank v. The Nantucket Steamboat Co.*, 2 Story, 16. He has a remedy by action on the implied contract of the passenger to pay the customary fare; and he has also a lien on the baggage, which he is not compelled to deliver until the fare is paid: Angell on Carriers, sec. 375; Story on Bail., sec. 604. By not requiring the fare to be paid in advance, he relies for remuneration on the remedies indicated.

In the present case, the defendant was a common carrier of passengers. The plaintiff engaged a passage to La Salle, and sent his baggage to the boat. The moment it was received on board, the defendant became responsible for the safe delivery at the port of destination, loss occasioned by inevitable accident or

the public enemies only excepted. The carpet-bag was stolen from the boat and never recovered by the plaintiff. Loss by theft is not within either of the exceptions to the risk of a common carrier. The defendant is therefore chargeable with the value of the articles in the carpet-bag, unless they are not to be regarded as forming a part of the baggage of a traveler. It is conceded that the articles of wearing apparel were properly baggage, and the only question is in respect to the pistols. What constitutes the baggage of a traveler, for the loss of which a common carrier is liable, is a question of some practical importance, and one that has been much considered in reported cases. It is argued in all the cases that the term "baggage" includes the wearing apparel of the traveler. In the *Orange County Bank v. Brown, supra*, the trunk of a passenger containing eleven thousand two hundred and fifty dollars in money belonging to the bank was lost; and the bank sought to recover the amount of the carrier, on the ground that it was part of the baggage of the passenger. But the court decided that the money did not fall within the term "baggage;" and that the attempt to carry it free of reward under cover of baggage was an imposition on the carrier.

In *Pardee v. Drew*, 25 Wend. 459, where a trunk containing valuable merchandise, and nothing else, was taken on board of a boat by a passenger, and deposited with the ordinary baggage, it was held that the carrier was not chargeable for its loss. In *Hawkins v. Hoffman, supra*, it was decided that the term "baggage" did not embrace samples of merchandise carried by a passenger in his trunk for the purpose of enabling him to make bargains for the sale of goods. In *Cole v. Goodwin*, 19 Wend. 251 [32 Am. Dec. 470], and *Weed v. The Saratoga etc. R. R. Co.*, Id. 534, the court held that a carrier was liable for money in the trunk of a passenger not exceeding a reasonable amount for traveling expenses. In *Jones v. Voorhees*, 10 Ohio, 145, a carrier was made liable for the value of a gold watch lost from the trunk of a passenger. In *McGill v. Rowand*, 3 Pa. St. 451 [45 Am. Dec. 954], the husband was permitted to recover of the carrier the value of his wife's jewelry which had been taken from her trunk on the coach in which she was a passenger. In *Porter v. Hildebrand*, 2 Harr. 129, the court held that a carpenter might recover from a carrier the value of tools contained with clothing in his trunk, which the carrier had lost, the jury having found that they were the reasonable tools of a carpenter.

The principle of the authorities is, that the term "baggage"

includes a reasonable amount of money in the trunk of a passenger intended for traveling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and that it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger. A more definite rule can not well be laid down. The remarks of Bronson, J., in *Hawkins v. Hoffman*, *supra*, are pertinent. He says: "It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for instruction or his amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such."

We think the articles in question formed a part of the baggage of the plaintiff, and as such come within the risk of the carrier. They were not carried for purposes of sale or traffic, but for the personal use and protection of the passenger; and it is not unusual for such articles to be carried in the trunks of travelers.

There was no substantial variance between the declaration and the evidence. The declaration alleged that the defendant received the carpet-bag, to be carried from Peoria to La Salle for a reward. The proof clearly sustained the averment. It indeed showed in addition, that the plaintiff engaged a passage for the same destination, and that he had other baggage. But as the only cause of complaint against the defendant was the loss of the carpet-bag, it was not necessary to state the additional matter in the declaration, especially in an action on the case for the breach of the common-law duty of the carrier. It might perhaps be otherwise in an action of *assumpsit* on the contract of the carrier: See *Reed v. Saratoga etc. R. R. Co.*, *supra*.

The judgment is affirmed.

Judgment affirmed.

LIABILITY OF CARRIER FOR PASSENGER'S BAGGAGE: See *Jordan v. Fall River R. R. Co.*, 51 Am. Dec. 44, note 47, where other cases are collected; *Bomar v. Maxwell*, Id. 682, note 684.

BAGGAGE OF PASSENGER, WHAT IS: See *Jordan v. Fall River R. R. Co.*, 51 Am. Dec. 44, note 48, where other cases are collected; *Bomar v. Maxwell*, Id. 682, note 684.

IN ACTION AGAINST COMMON CARRIER FOR LOST BAGGAGE, damages may be assessed for the loss of such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement, or protection: *Parmelee v. Fisher*, 22 Ill. 214; *Chicago, R. I. & P. R. R. Co. v. Collins*, 56 Id. 217, both citing the principal case. In *Davis v. Michigan S. & N. I. R. R. Co.*, 22 Id. 281, the principal case is cited to the point that a revolver carried by a passenger is baggage.

HAWKINS v. VINEYARD.

[14 ILLINOIS, 26.]

PORTION OF QUARTER-SECTION OF LAND SOLD ON EXECUTION AS ONE

TRACT can not be redeemed by paying the proportionate price received for that part, although the judgment debtor have title to that part only; but the sale being entire must stand as such or be wholly vacated.

APPEAL from the Perry circuit court. The opinion states the case.

R. S. Nelson, for the appellant.

R. F. Wingate, for the appellees.

By Court, TREAT, C. J. This was a suit in chancery brought by Hawkins against Vineyard and Hoge. The bill alleged in substance that Vineyard recovered a judgment against complainant, and sued out an execution thereon; that Hoge, as sheriff, levied the execution on a quarter-section of land containing one hundred and sixty acres, and that Vineyard purchased the same at the sheriff's sale for one hundred and sixty dollars; that the complainant was the owner of sixty-five acres of the tract, but had no title whatever to the residue; that complainant within twelve months from the sale, applied to Hoge to redeem the sixty-five acres, and offered to pay him sixty-five dollars, and interest thereon from the day of the sale at the rate of ten per cent. per annum, but Hoge refused to receive the money and allow the application; complainant brought the amount tendered into court, and prayed that he might be allowed to redeem the sixty-five acres. The court sustained a demurrer, and dismissed the bill.

The quarter-section having been sold as one tract, and the

complainant having title to but a part thereof, it would be highly inequitable to permit him to redeem that part, and leave the sale in full force as to the remaining portion. The sale was an entire sale, and it should be allowed to stand as such, or be wholly vacated. The complainant should have tendered the whole of the purchase money and interest, and have redeemed the entire tract. He ought to put the creditor in as good a condition as he was in before the sale. He should give him the benefit of his purchase, or allow him to obtain full payment of his judgment. But the complainant seeks to redeem the sixty-five acres, and at the same time insists that the sale of the rest of the tract shall stand. He would thereby obtain a credit on the judgment by the sale of property in which he had no interest and from which the creditor could receive no benefit. Equity will not tolerate such injustice. A party who seeks relief at the hands of a court of equity must perform what is just and equitable on his part.

The decree is affirmed.

Decree affirmed.

PORTION OF TRACT OF LAND SOLD AS ONE TRACT which is owned by judgment debtor can not be redeemed separately from the rest of the tract. The principal case is cited to this effect in *Durley v. Davis*, 69 Ill. 136.

MOBLEY v. RYAN.

[14 ILLINOIS, 51.]

INDORSEMENT WITHOUT DATE IS PRESUMED TO HAVE BEEN MADE before the maturity of the note.

BURDEN IS ON MAKER TO SHOW THAT INDORSEMENT OF NOTE was made after maturity.

MAKER MAY SHOW THAT EXECUTION OF NOTE WAS OBTAINED BY FRAUD, and thus defeat a recovery upon it by the assignee who received it before maturity, under the Illinois statute; but any other defense, such as payment, is no defense to such a note unless the maker prove that the assignee had notice thereof when it was assigned.

PAYMENT ON NOTE ASSIGNED BEFORE MATURITY MADE TO ANOTHER THAN ASSIGNEE, and subsequent to assignment, is no defense against the assignee.

ASSIGNEE IS NOT BOUND TO GIVE MAKER NOTICE OF ASSIGNMENT.

ERROR to the Gallatin circuit court. The opinion states the case.

N. L. Freeman, for the plaintiff in error.

W. Thomas, for the defendant in error.

By Court, TREAT, C. J. This was an action of debt brought by Ryan as surviving assignee of the Bank of Illinois against Mobley. The declaration was on a promissory note made by the defendant to Gatewood, and by the latter assigned to the bank. The plea was payment. On the trial the plaintiff introduced a promissory note made by the defendant on the twenty-eighth of October, 1840, for the sum of one hundred and fifty dollars, and payable to E. H. Gatewood, on or before the first of March, 1842, with the signature of Gatewood indorsed thereon, over which the plaintiff wrote an assignment to the bank. It was admitted by the parties that the books of the bank showed that the note was discounted in the bank by Gatewood before it became due; but the defendant objected to the competency of the books to prove that fact. It was further admitted that the note was given for a tract of land sold by Gatewood to the defendant, and that the defendant before the note fell due sold the land to Sanders, who agreed to pay one hundred and thirty-three dollars on the note; that after the note was due, but before the defendant had any notice of the assignment thereof, Gatewood applied to him for payment, and represented that he had mislaid the note, but would find the same and give it up if the defendant would pay it; that Sanders then executed a note to Gatewood for one hundred and thirty-three dollars, with defendant as security, and defendant executed another note to Gatewood for the balance, with Sanders as security, which two notes were received by Gatewood in full satisfaction and discharge of the note now in controversy; that the two notes were fully paid to Gatewood and taken up, before the defendant had any notice of the assignment of the note in question by Gatewood to the bank. On this state of case, the court rendered judgment in favor of the plaintiff for the amount of the note and interest.

It will not be necessary to inquire whether it was competent to prove by the books of the bank when the note was indorsed. Where an indorsement is without date, the presumption of law is, that it was made before the note became due. If the time of the indorsement becomes material for the purpose of defense, it is incumbent on the maker to show that it was made after the maturity of the instrument, and thereby destroy the legal presumption.

It was so expressly ruled in *Pettis v. Westlake*, 3 Scam. 535. In this case, there was nothing in the evidence tending to rebut the presumption that the note was assigned to the bank before

it fell due. The question then arises, Is the defendant to be protected in the payment made to the payee after the maturity of the note? It is one of easy solution. Under the provisions of our statute, if a note is assigned before it falls due, the maker may show in defense that the execution of the instrument was obtained by fraud or circumvention, and thus defeat a recovery upon it by the assignee. But he is not permitted to set up any other defense to a note assigned before maturity, unless he shows that the assignee had notice of the defense when he received the assignment. In such case, he is not even allowed to avail himself of a payment made on the note previous to the assignment, unless he proves that the assignee had notice thereof when the note was assigned. It follows that he is not protected in making payment to the payee subsequent to an assignment made before maturity. When a note is thus assigned, the maker becomes the debtor of the assignee, and can not discharge himself by making payment to any other person. The assignee is not affected by any subsequent transactions between the original parties to the instrument. He is not bound to give the maker notice of the assignment. The latter must ascertain who is the holder of the note, and make payment accordingly. He can fully protect himself against a demand of payment from the payee, by refusing to pay unless the note is surrendered. If the defendant had pursued such a course, no difficulty would have arisen. The payment in question was made in his own wrong, and he must abide the consequences of his negligence.

The judgment must be affirmed.

Judgment affirmed.

INDORSEE OF NOTE AFTER MATURITY HOLDS IT SUBJECT TO ALL EQUITIES between original parties, whether he have notice thereof or not: *Comstock v. Draper*, 53 Am. Dec. 78, and note citing prior cases.

INDORSEMENT WITHOUT DATE IS PRESUMED TO HAVE BEEN MADE BEFORE MATURITY. The principal case is cited to this effect in *Depuy v. Schuyler*, 45 Ill. 307; *Smith v. Newlin*, 89 Id. 194. In *Colburn v. Averill*, 50 Am. Dec. 630, it is held that such an indorsement is presumed to have been made at the inception of the note.

INDORSEE, BEFORE MATURITY, HAVING NOTICE OF FRAUD OR PRIOR EQUITIES subsisting at time of indorsement, takes the instrument subject thereto: See *Fisher v. Leland*, 50 Am. Dec. 805, and note citing prior cases. The principal case is cited in *Depuy v. Schuyler*, 45 Ill. 307, to the point that in Illinois the maker may show fraud in the execution against an indorsee before maturity, although without notice.

PAYMENT ON NOTE BEFORE MATURITY CAN NOT BE SET OFF against bona fide holder for value before maturity: *Harrison v. Edwards*, 36 Am. Dec.

364. But if made at maturity to the apparent holder, who delivers up the note, it is valid: *Wheeler v. Guild*, 32 Id. 231; but not if he knew of the holder's want of title: *Proctor v. McCall*, 23 Id. 135.

ROGERS v. WILEY.

[14 ILLINOIS, 65.]

PROOF THAT SUBSEQUENT PURCHASER HAD ACTUAL NOTICE OF PRIOR UNRECORDED DEED must be clear and positive, so as to leave no reasonable doubt that the taking of the second conveyance was an act of bad faith towards the first purchaser.

SUBSEQUENT PURCHASER IS NOT PUT UPON INQUIRY AS TO EXISTENCE of a prior unrecorded deed, by information of the possible existence of such a deed, when from the same informant he learns that it was to be canceled.

BILL to foreclose a mortgage. Wiley, the complainant, alleged that Levi Rogers executed to him a mortgage upon certain lands belonging to the mortgagor to secure the payment of an indebtedness due from the latter to the complainant; and that the mortgage was executed March 23, 1848, and acknowledged and recorded the same day. Daniel Rogers, who had been made a party defendant to the bill, filed an answer, in which he claimed title to the land mortgaged under a deed from Levi Rogers and wife executed January 25, 1847, but not recorded until June 10, 1848. He also alleged that Wiley had due notice of this conveyance at the time of the execution of the mortgage. The remaining facts are stated in the opinion. The bill was taken *pro confesso* against Levi Rogers and a decree of foreclosure was entered in the circuit court. This writ of error is sued out by Daniel Rogers.

S. Breese, for the plaintiff in error.

E. Y. Rice, for the defendant in error.

By Court, TRUMBULL, J. The statute makes void all deeds till filed for record, except as against creditors and subsequent purchasers with notice; unless, therefore, Wiley, at the time he took the mortgage from Levi A. Rogers, had notice of the prior unrecorded deed to Daniel Rogers, the decree of foreclosure must stand.

To take a case out of the registry acts, so as to defeat the title of a subsequent purchaser who first places his deed upon record, on the ground that he had actual notice of a prior unrecorded deed of the same premises, the proof of such notice

should be clear and positive, so as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser.

The evidence in this case wholly fails to show that Wiley had such notice.

Hancock, the principal witness relied on to prove the notice, states in substance, that in a conversation with Wiley some three weeks previous to the date of the mortgage, he informed him that Levi A. Rogers had mortgaged the land in controversy to the township; that he subsequently sold it to one Kingston, who executed his own mortgage to the township and satisfied the one executed by the said Levi; that Kingston afterwards sold the land to Daniel Rogers, and then found that he had never received a deed from Levi; that Daniel directed him to get a deed from Levi directly to him, Daniel; that Levi afterwards bought the land back from Daniel; and that the deed from Levi to Daniel was to be burned or destroyed when Levi made a mortgage to the township.

Another witness, who was present at the same conversation, corroborates Hancock as to what was said about the various sales, but he heard nothing said about any deeds between any of the parties. This evidence, so far from showing that the land belonged to Daniel Rogers, proves that it really belonged to Levi A. Rogers.

The same source from which Wiley learned of the sale to Daniel also informed him of the resale back to Levi, in whom was the legal title as shown by the records.

If Wiley heard and understood all that the witness Hancock says he told him, which is very uncertain, he was not bound to go to Daniel Rogers and inquire whether Levi had ever executed to him a deed in accordance with a direction which he had at one time given, when he learned from the same person who informed him of the direction that if complied with, the deed was to be canceled. One witness testifies, that in a conversation with Wiley in the fall after the date of the mortgage, Wiley gave him to understand, that in the absence of the deed to get the certificate of acknowledgment fixed, he had got the mortgage recorded; but when interrogated, he says expressly that he did not know whether Wiley meant that when he got his mortgage recorded he knew of the deed, or whether he learned it afterwards. The other evidence in the record relied on to prove notice is still more loose and unsatisfactory than that which has been referred to, and it falls far short of convinc-

ing the mind that Wiley took his mortgage with actual knowledge of a prior existing deed to Daniel Rogers.

Decree affirmed.

CONSTRUCTIVE NOTICE OF UNRECORDED DEED: See *Price v. McDonald*, 54 Am. Dec. 657, and note citing prior cases.

RICHESON v. RYAN.

[14 ILLINOIS, 74.]

PARTY PAYING JUDGMENT AGAINST HIMSELF BEFORE EXECUTION ISSUED does not thereby waive his right of testing its validity in the appellate court.

WRIT of error was sued out by Richeson to a judgment obtained against him by Ryan. A plea for a release of errors was filed by Ryan, on the ground that Richeson had voluntarily paid the judgment. Richeson demurred to this plea.

J. Olney and N. L. Freeman, for the plaintiff in error.

W. Thomas, for the defendant in error.

By Court, TREAT, C. J. Ryan recovered a judgment against Richeson. The latter paid the judgment before an execution issued, and then sued out a writ of error to reverse it. Did the payment operate as a release of errors? If the judgment had been collected by execution, there would not be a doubt of the right of Richeson to prosecute the writ of error. A payment made under such circumstances would be compulsory, and would not preclude him from afterwards reversing the judgment if erroneous, and then maintaining an action to recover back the amount paid. The payment in question must equally be considered as made under legal compulsion. The judgment fixed the liability of Richeson, and he could only avoid payment by procuring its reversal. He was not bound to wait until payment should be demanded by the sheriff. He was at liberty to pay off the judgment at once, and thereby prevent the accumulation of interest and costs. By so doing, he did not waive his right to remove the record into this court, for the purpose of having the validity of the proceedings tested and determined. The pleas are bad, and the demurrer must be sustained.

Demurrer sustained.

PARTY COLLECTING MONEY ON JUDGMENT CAN NOT PROSECUTE WRIT OF ERROR to reverse it until he has refunded the money: *Knox's Distributees v. Steele*, 54 Am. Dec. 181.

LESHER v. WABASH NAVIGATION COMPANY.

[14 ILLINOIS, 85.]

CORPORATION AUTHORIZED BY CHARTER TO ENTER UPON PRIVATE PREMISES and take therefrom materials for the erection of public works, and liable for compensation to the owners, is liable to the owners for the materials so taken by contractors employed by the corporation for the prosecution of a portion of the work, although the contractors were to furnish the materials and to do the work for a stipulated price.

CONTRACTORS EMPLOYED TO PERFORM PORTION OF PUBLIC WORK BY CORPORATION chartered for that purpose are none the less the servants of the corporation because they do the work by contract and for a stipulated price.

PRIVILEGES CONFERRED BY CHARTER UPON CORPORATION TO ENABLE IT TO EXECUTE a public work devolve upon contractors employed by the corporation for the same purpose.

PERSON INJURED BY ACTS DONE BY THOSE IN EMPLOY OF CORPORATION and in pursuance of its charter has a right to look for compensation to the principal, who alone had authority to direct such acts.

CORPORATION IS NOT RELIEVED FROM ITS PRIMARY LIABILITY FOR DAMAGES occasioned to individuals by the exercise of its chartered rights by contractors employed by the corporation merely because the contractors may under their contract be liable over to the corporation for such damages.

PETITION filed in the circuit court by the plaintiffs in error, under the eleventh section of an act incorporating the Wabash Navigation Company, to recover the value of materials taken from their land by Samuel and Isaac Culbertson. The defense of the corporation, that it was not liable for the acts of the Culbertsons, as they contracted to furnish the materials and do the work for an agreed price, was sustained, and an agreed case was submitted to this court. The opinion presents the facts.

C. H. Constable, for the plaintiffs in error.

A. Kitchell, for the defendants in error.

By Court, CATON, J. By the eleventh section of their charter, the Wabash Navigation Company were authorized to enter upon certain premises, including the plaintiffs', and take therefrom timber, stone, and other materials necessary and proper for the construction of their works. And the owners of the premises were authorized to file a petition in the circuit court, and have the value of the materials taken, and damages occasioned by reason of the taking of the same, assessed, for the amount of which a judgment should be rendered in favor of the owner, and against the company. For the purpose of erecting a portion of the works authorized by their charter, the company

entered into a contract with the Culbertsons for the erection of a lock and dam at the Grand Rapids of the Wabash river, by which the Culbertsons were to furnish all the materials and do all the work for a price specified in the contract, to be paid by the company. In the execution of the work, the Culbertsons entered upon the plaintiffs' land and took therefrom a considerable amount of timber which was necessary and proper for the construction of the work, and applied it to that purpose without objection by the plaintiffs, who subsequently filed their petition in the circuit court, for the purpose of having their damages assessed in the mode pointed out by the defendants' charter, claiming to recover the same from the defendants, and the only question presented for our consideration is, whether the company is liable.

The contractors were none the less the servants of the company because they were doing the work by contract and for a stipulated price. The work was still done by the company, and under the authority of their charter. The privileges which the charter conferred upon the company, to enable them to execute the work, devolved upon the contractors for the same purpose. The very erection of the dam across the river was an obstruction to its navigation, and would have been unlawful but for the authority conferred by the charter. Had the Culbertsons been prosecuted for damage occasioned by reason of such construction, they would immediately have sought protection under the charter. So, too, had Lesher objected to their taking the material which they did take, they would have asserted their right to do so under the charter, and must have been protected in that right to the same extent that the company would have been had they prosecuted the work without the intervention of contractors. If it was necessary for the company to take private property to enable them to prosecute the work for the public good, it was equally so for the contractors. Had a cause of action accrued to an individual by reason of the obstruction erected in the river, the company, whose work it was, would have been liable as much as if they had erected it with their own hands. If they are liable for one act done under the charter by the Culbertsons, they are equally so for another.

It is no answer to say that the contractors were bound by their contract to furnish all the materials at their own expense, and for which they were to recover a full compensation. The public were not bound to know the relations existing between the com-

pany and their servants. It was enough that they saw them engaged in the erection of the works of the company, and under the direction of the company's engineer. The person who was injured by reason of acts done by those in the employ of the company, and in pursuance of their charter, had a right to look to the principal, who alone had authority to direct the acts to be done for compensation, and was not bound to seek redress from every servant who cut a tree or removed a stone. Were the rule otherwise, the company might, by the employment of irresponsible servants, compel the owner of the land to stand by and see it stripped of all that made it valuable, without a hope of remuneration. They would derive the benefits secured by their charter, protected from the liabilities which it imposes. It is not necessary, in the decision of this case, to say whether the company would have been liable for the tortious acts of the contractors which were not authorized by the charter, for there is no pretense here but that the acts for which compensation is now sought of the company were expressly authorized by the charter to be done. It may be true that it is the duty of the contractors to pay these damages, as they were bound by their contract to furnish the materials; and if so, they will be liable over to the company for the damages which the company necessarily has to pay for the acts of the contractors, but this ultimate liability of the contractors does not relieve the corporation from their primary liability to pay the damages occasioned to individuals by the exercise of the chartered rights of the company, and in the mode, too, which the charter provides.

Irrespective of the resolution passed by the board of directors of the company, on the fifteenth day of May, 1848, recognizing the authority of the contractors to exercise the rights conferred upon the company to take materials necessary for the construction of the works, we are of opinion that the company is liable for the damages occasioned by the acts of the contractors which were authorized by the charter to be done by the company. As to the persons who have thus sustained damages, the contractors were the servants of the company, and their acts were the acts of the company.

The judgment of the circuit court must be reversed, and the cause remanded.

Judgment reversed.

CORPORATION LIABLE FOR ACTS OF ITS CONTRACTORS, WHEN: See *Stone v. Cheshire R. R. Corporation*, 51 Am. Dec. 192, and extensive note. In this case it was held, that when a railroad corporation contracted with other

parties to build a part of its road, and while they were blasting rock a fragment struck the plaintiff and injured him, the corporation was liable for the injury. The majority of authority recognizes the general rule that a contractor, engaging to perform a stipulated work for an agreed price, is not the servant of the employer, and the latter is therefore not liable for his torts. This rule is subject to various exceptions, such as are set forth in the note just referred to. The principal case maintains also an exception to this general rule, and has been cited as authority to this effect in several cases. That is, to the effect that a corporation employing contractors to execute its special franchise or privilege, and without whose authority the acts of the contractors would be unauthorized and tortious, is, with respect to those acts of the contractors performed under its franchises, liable as a master for the acts of his servant: See *City of Detroit v. Corey*, 9 Mich. 185; *R. R. I. & St. L. R. R. Co. v. Wells*, 66 Ill. 321. A railroad company is liable for the negligence of lessees exercising its franchise or right of way: *P. & R. I. R. R. Co. v. Lane*, 83 Id. 449. It is the duty of a municipal corporation to keep its streets in a safe condition, and this duty can not be shifted upon a person employed to perform that duty: *City of Springfield v. Le Claire*, 49 Id. 479. The cases rely partly or wholly upon the authority of the principal case, which is the leading case in Illinois upon this point. But a railroad corporation is not liable for injuries to a servant of the contractor while in his employ, at least if they are received in the performance of an ordinary duty not specially and essentially authorized by virtue of the corporate franchise of the corporation. For the principal case and similar cases are authority for the primary responsibility of the employing corporation only in those cases where the redress is sought against it for wrongs done by persons while in the performance of acts which they would have had no right to perform except under the charter of the company: *West v. St. L. V. & T. H. R. R. Co.*, 63 Id. 546. And the same distinction is made in *Hilliard v. Richardson*, 3 Gray, 365. The case of *Hinde et al. v. Wabash Navigation Co.*, 15 Ill. 73, was an action by another plaintiff against the same defendant upon a similar cause of action, and, in accordance with the principal case, the plaintiff was allowed to recover.

SANGAMON AND MORGAN RAILROAD Co. v. COUNTY OF MORGAN AND TOWN OF JACKSONVILLE.

[14 ILLINOIS, 163.]

JURISDICTION OF COUNTY TO LEVY TAX ON REAL ESTATE does not extend beyond its own limits, for real estate necessarily has a fixed and unchangeable locality.

PERSONAL PROPERTY FOLLOWS, WITH CERTAIN QUALIFICATIONS, RESIDENCE OF OWNER, and is there taxable.

PERSONAL PROPERTY TEMPORARILY ABSENT FROM OWNER'S RESIDENCE and to be immediately returned is taxable at the owner's residence.

RESIDENCE OF CORPORATION IS WITHIN STATE CREATING IT, and at the place where its principal office or place of business is.

RAILROAD COMPANY HAS NO RESIDENCE IN COUNTY through which its road and trains pass and in which its trains stop only temporarily to receive and discharge freight and passengers.

ROLLING STOCK AND FURNITURE OF RAILROAD ARE PERSONAL PROPERTY. COUNTY IN WHICH RAILROAD COMPANY HAS NO RESIDENCE CAN NOT TAX the proportion of the company's personal property which the length of track in that county bears to the whole length of the track within the state.

COUNTY AUTHORIZED TO TAX PROPERTY WITHIN ITS LIMITS may tax the portion of a railroad track within its limits.

VALUATION FOR COUNTY TAXATION OF PORTION OF RAILROAD WITHIN COUNTY must be of that portion of road within the county, irrespective of the value of the whole road, and not of an undivided part of the value of the whole road.

RULES FOR ASSESSMENT AND VALUATION OF RAILROAD FOR CITY PURPOSES are the same as those for county purposes.

AGREED case was filed in this court, wherein it was set forth that the Sangamon and Morgan railroad extended a distance of fifty-five miles, from Naples to Springfield, twenty-seven miles of which was within the county of Morgan, two miles of which was within the limits of the town of Jacksonville. The assessors of this county and town assessed for purposes of taxation the value of the whole road at one hundred and twenty-five thousand dollars, and the rolling stock of the company at twenty-five thousand dollars. The defendants in error claimed state and county taxes for the county of Morgan, on twenty-seven fifty-fifths of each of these sums, and corporation taxes for Jacksonville on two fifty-fifths of the same items. The plaintiffs in error had an office, agents, depot, and engine-house at Naples; a station, office, and agent at Jacksonville; and at Springfield, Sangamon county, a depot, engine-house, machine-shop, and an office, where their principal agent in this state resided, who managed and superintended the whole road, and made financial reports to the president of the company, whose residence was in New York, where were also the principal office and corporate seal of the company. At the machine-shop in Springfield all the rolling stock was kept when not in service, and repaired when out of order. The locomotives and cars remained at Springfield or Naples at night. The trains stopped every day at Jacksonville on their trips between Springfield and Naples, and cars were occasionally left there to be freighted. The question submitted was whether the taxes had been correctly assessed. Upon this agreed case, the judgment of the lower court was for the defendants in error, to the effect that the taxes were rightfully assessed. The railroad company brought error.

S. T. Logan, for the plaintiffs in error.

M. McConnel and D. A. Smith, for the defendants in error.

By Court, CATON, J. The eighth section of the eighty-sixth chapter of revised statutes says that "the county commissioners' court shall have the power to levy a tax in their respective counties for county purposes," etc. The subjects of this tax are those specified in the previous portion of the chapter, and the same as those upon which the state tax is levied. But this tax must be levied within the county; that is, upon property, real or personal, subject to taxation, which is situated or located within the county. It was not controverted on the argument that the railroad track is real property, within the meaning of the second section of that chapter, which says: "The term 'real property,' with respect to the assessment and collection of the revenue, shall be construed to include all lands within this state, and all buildings and other things erected on or affixed to the same; and the terms 'lands' and 'lots,' whenever they occur in this chapter, shall be construed as having the same meaning as 'real property.'" The jurisdiction of the county to levy this tax does not extend beyond its own limits, so far as real estate is concerned, which must of necessity have a fixed and unchangeable locality. The same rule does not necessarily prevail as to personal property, which is transitory in its character, and need not be actually within the state even when the tax is levied, for it may be taxable "whether at home or abroad." We think, with certain qualifications, personal property follows the residence of the owner, and is there taxable. This is certainly true where the owner resides within the state, and the property is only temporarily absent from his residence, with the design of an immediate return. Thus, if a man keeping a livery stable in Springfield had a team absent on a journey in another state at the time the assessment was made, he would be bound to include that property in the schedule of taxable property, while the rule might be different if he had personal property permanently located in another state or another county. In this case, the owner of the property is a corporation, the principal officers of which reside out of the state. The location or residence of the corporation must be considered to be in the state by whose laws it was created; and that residence must be where its principal office or place of business is. It is not necessary to say whether there could be more than one such residence within the state. In Morgan county the corporation had no such location. The principal office of the company is in Sangamon county, where its principal and managing agent resides, and where the personal property

is kept when not in active service. In Morgan county it has no locality. It merely passes through the county along the road, and only stops there temporarily to receive and discharge freight and passengers. There, however, has been no attempt to tax any specified portion of the personal property, but an undivided portion of the whole. This upon the argument was attempted to be justified upon the assumption that the rolling stock of the road was really a part of the road itself; and then upon the further assumption of the right to tax an undivided portion of the entire road. This road and the furniture do not constitute one entire estate, either real or personal. The furniture is personal property, and constituted no part of the road, which is real property. It is no more a part of the road than is the furniture of a house a part of the house. A house and its furniture may be sold or leased together, but that does not change the character of the property of either.

It may be true, as was said upon the argument, that the road would be of little value without rolling stock, and that the latter would be equally useless without the former. Their dependence on each other does not prove that both constitute but one thing. The furniture of the road may be removed from it and used elsewhere without injury to or impairing the value of the road itself. But if these two species of property constitute but one estate, why were they assessed separately? We have no doubt that the tax assessed in Morgan county upon the personal property of the company was improper. That portion of the road, however, which lies within Morgan county, was taxable there. But we think the mode of valuation was improper. Instead of valuing and assessing the twenty-seven miles of road which is situated in Morgan county, an undivided portion of the whole road was assessed and taxed. The valuation should have been of, and the assessment upon, that portion of the road which was situated in Morgan county. We can not know, nor is it even probable, that each mile or portion of the road was of equal value. It is not probable that each portion of the road was equally profitable or productive. One portion of the road may be badly constructed, and another well constructed. One portion may have heavy grades and curves, and another portion be level and straight. In some places, the land occupied by the road may be very valuable, while in other places it may be nearly valueless. All of these considerations, as well as its connection with the whole, must be taken into the account in ascertaining the value of any given portions of the road. But admitting that each

portion of the road was of equal value, still the valuation should have been of that specific part which was situated within the county, and not of an undivided part of the whole road, portions of which are within two other counties. A farm or a field might be divided by a county line, but in such case the valuation should not be of the whole farm or field, and the assessment made upon such valuation, in proportion to the quantity situated in the county for which the tax is levied. Each county must assess and tax the real property within its limits, and no other. All that has been said in relation to the county tax is equally applicable to the tax levied by the corporation of the town of Jacksonville.

We are of opinion that neither tax was legally assessed, and that the judgment of the circuit must be reversed.

Judgment reversed.

WHERE PROPERTY IS TO BE TAXED: See extensive note to *City of New Albany v. Meekin*, *post*, p. 552, in which the prior cases in this series are referred to. The principal case is cited in *Mills v. Thornton*, 26 Ill. 301, to the point that personal property is taxable at the owner's residence, unless permanently located elsewhere.

DOMICILE OF CORPORATION IS WITHIN STATE CREATING IT: See *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Am. Dec. 742; *Raymond v. City of Lowell*, Id. 57; *Clarke v. Bank of Mississippi*, 52 Id. 248. For jurisdictional purposes, it is at its chief place of business: See note to *Wood v. Hartford Fire Ins. Co.*, 33 Id. 399.

FIXTURES, WHAT ARE: See *Randolph v. Gwynne*, 51 Am. Dec. 265; *Mackee v. Smith*, 52 Id. 615; *Harlan v. Harlan*, 53 Id. 612, and cases cited in the notes.

VALUATION OF RAILROAD TRACK SHOULD NOT BE OF UNDIVIDED PART OF WHOLE ROAD, or of anything but the specific portion contained within the limits of the taxing jurisdiction, and should be irrespective of the value of other portions of the road. The principal case is cited to this point in *Huntington v. C. P. R. R.*, 2 Saw. 510, 511.

TOWN OF PETERSBURG v. MAPPIN.

[14 ILLINOIS, 193.]

TRUSTEES OF TOWN POSSESS ONLY SUCH POWERS AS ARE SPECIFICALLY CONFERRED by the act of incorporation, or are necessary to carry into effect the powers expressly granted; and if they transcend the authority so conferred, their acts are not binding upon the town or third persons. TRUSTEES OF TOWN MAY SUE AND BE SUED, and take all steps necessary to assert and secure the rights of the corporation. POWER OF TRUSTEES OF TOWN TO PROSECUTE AND DEFEND SUITS on behalf of the corporation includes the power to compromise the same;

and a settlement of an existing controversy, if made in good faith, binds the corporation, though if collusive it is not obligatory.

MERE ERROR IN JUDGMENT WILL NOT VITIATE SETTLEMENT of controversy by trustees of town in behalf of the corporation, if made in good faith.

ERROR to the Menard circuit court. The opinion states the case.

W. H. Herndon, for the plaintiffs in error.

T. L. Harris and J. T. Stuart, for the defendants in error.

By Court, TREAT, C. J. In March, 1849, Mappin & Estel obtained from the president and trustees of the town of Petersburg a license to keep a grocery; and they, with Atchinson and Lanning as sureties, executed a bond to the corporation, in the penalty of five hundred dollars, conditioned that they would keep an orderly house, and would not keep the same open on Sundays, nor permit gaming or riotous conduct therein. In April, 1850, the corporation recovered a judgment against all of the obligors for the penalty of the bond and costs of suit. The defendants obtained leave to prosecute an appeal to the supreme court, on entering into the requisite bond within ninety days from the rendition of the judgment. They were about perfecting the appeal, when the trustees proposed a compromise, and suggested the propriety of circulating a petition in favor of such a course among the voters of the town. One hundred and fourteen of the one hundred and thirty voters of the town petitioned the board of trustees to release the judgment on the payment of the costs. On the twenty-second of May, 1850, the board passed an order remitting the judgment on payment of costs. The defendants paid the costs, amounting to thirty-eight dollars; and the board then made an order directing the sheriff to return the execution satisfied in full, which was accordingly done.

In consequence of these proceedings, the defendants failed to perfect their appeal. In October, 1851, the corporation filed a bill in chancery against the defendants in the judgment, alleging that there was no valid consideration for the release and satisfaction, and praying that the same might be set aside, and that an execution might issue for the collection of the judgment. After the filing of the bill, eighty-three voters of the town petitioned the board of trustees to rescind the orders for the release and satisfaction of the judgment. The trustees originally agreed to give the attorney who brought the suit on the bond one half of any judgment that should be recovered

thereon; and he afterwards obtained judgment against the corporation for two hundred and fifty dollars, which was discharged in the obligations of the town. Estel and Atchinson were solvent when the judgment was rendered on the bond, but they subsequently became insolvent. The foregoing facts appear from the pleadings and proofs in the chancery case. The court dismissed the bill, and the corporation sued out a writ of error.

The trustees of the town possess only such powers as are specifically conferred by the act of incorporation, or are necessary to carry into effect the powers expressly granted. They must keep within the limits prescribed by the charter. If they transcend the authority conferred thereby, their acts are not binding on the town or third persons. They have no power to give away the funds of the town, or appropriate them to purposes not warranted by the charter. They must faithfully apply the corporate property to the uses and objects specified in the charter. As they can not directly dispose of it by way of gratuity, so they can not accomplish the same result by device or indiscretion. They can not, under color of a sale, transfer the property of the corporation without consideration; nor can they, under the pretense of satisfaction, discharge a debt due the corporation without payment. But they may sue and be sued, and take all steps necessary to assert and secure the rights of the corporation. The power to prosecute suits on behalf of the corporation includes the power to settle the same. So the power to defend suits brought against the corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant. The law vests them with a discretion in such matters, which they are to exercise for the best interests of the corporation. A settlement of an existing controversy, if made in good faith, binds the corporation; but if collusively made, it is not obligatory.

In the present case, the trustees had authority to grant the license and take the bond. On a forfeiture of the obligation, they could sue and recover the penalty. They might decline to pursue that course, if satisfied that no benefit would accrue to the town by so doing. They could compromise the matter by receiving less than the penalty, if they considered the result of a suit upon a bond doubtful, or the collection of a judgment against the obligors uncertain. They brought a suit upon the obligation, and obtained a judgment for the amount of the penalty.

But the judgment did not conclusively establish the right of the corporation to recover the money. The obligors had the right to have the case reviewed in the supreme court, and they were proceeding to exercise it. The result of their appeal might be to reverse the judgment, and render the corporation liable for all the costs that had accrued in the case. In this state of things, a compromise was effected, by which the trustees agreed to abandon the prosecution, and the defendants assumed the payment of the costs. The transaction amounted to a settlement of the pending controversy on those terms. It is not pretended but that the trustees acted in good faith, and with the view of promoting the best interests of the town. In adjusting the controversy, they were acting strictly within the scope of their authority. Whether the arrangement was a judicious one, is not the question. A mere error of judgment will not vitiate the settlement. If it was within the competency of the court to revise this exercise of their discretion, there is nothing in the case to show that the settlement was unwise or improvident, for the proceedings in the action on the bond are not set forth in the record. It may be that it was advantageous to the corporation. The judgment may have been clearly erroneous, and therefore certainly reversible on appeal.

The decree is affirmed.

Decree affirmed.

MUNICIPAL CORPORATION CAN EXERCISE ONLY POWERS EXPRESSLY GRANTED, and such others as may be necessary to the due execution of the powers expressly granted: *Collins v. Hatch*, 51 Am. Dec. 465; note to *Robinson v. Mayor of Franklin*, 34 Id. 627.

TOWN MAY BY VOTE RELEASE AS WELL AS CONTRACT DEBT: *Ford v. Clough*, 23 Am. Dec. 513.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

COLERICK v. HOOPER.

[3 INDIANA, 316.]

CIRCUIT COURT HAS POWER TO ORDER CLERK TO COPY INTO RECORD writs and returns showing notice to defendants in a bill upon which decree was rendered by default, after the expiration of the term of court at which the decree was made, and after the issuing of a *certiorari* from the supreme court to obtain a new transcript, the former one being defective in not showing the notice; it having been made to appear at the time the court entered the order that, on taking the default, proof of the service of the writs was duly made.

SHERIFF'S RETURN UPON WRIT THAT HE SERVED PROCESS upon certain named defendants, and could not find the others, imports that a personal service was made upon those found.

PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY REAL PROPERTY indicated in a contract for its sale, and described therein with sufficient certainty so that it can be thus identified.

SPECIFIC PERFORMANCE OF WRITTEN INSTRUMENT MAY BE ENFORCED when it contains all the facts of the contract except such as may be legitimately proved by parol evidence.

FINAL DECREE, AFTER DECREE PRO CONFESSO, MAY BE RENDERED WITHOUT PROOF, where the bill is against adult residents of the state who are personally served with notice, and the allegations of the bill are certain, especially if the subject-matters of those allegations are of a definite and certain nature.

ASSIGNOR OF CONTRACT FOR SALE OF LAND IS NOT NECESSARY PARTY, in Indiana, to suit by the assignee for specific performance thereof, as under the statute of this state the assignment of such an instrument carries with it the legal title, and not a mere equity.

ERROR to the St. Joseph circuit court. The opinion states the case.

J. G. Walpole and R. L. Walpole, for the plaintiffs in error.

J. L. Jernegan, for the defendant in error.

By Court, PERKINS, J. This was a bill in chancery to enforce the specific performance of an agreement for the sale of a lot in the town of South Bend. A decree for performance was obtained. It is claimed that that decree should be reversed for the following reasons:

1. The decree was rendered upon default, and the record, as first brought into this court, did not show notice to the defendants. By *certiorari*, a new transcript was obtained, wherein, by order of the court below, made after the *certiorari* was issued, the clerk had copied the writs and returns of services thereon which remained on file in his office, and which showed that notice was duly given to the defendants in the suit. It is denied that the circuit court had power to order the clerk to copy the writs and returns into the record after the expiration of the term of the court at which the decree in the cause was made, and after the issuing of the *certiorari*. But we think the court had such power. It was made to appear, at the time the court entered said order, that on taking the default in the cause, proof of the service of the writs was duly made to the circuit court. It was a clerical error, therefore, by which the entering of those writs and returns, or in lieu of them a statement that process had been duly served, was omitted.

2. It is contended that the returns upon the writs do not show that legal service had been made. They are as follows: "Came to hand January 10, 1844. Served on John A. Hendricks the twelfth day of January, 1844. As to Alexis Coquillard and David H. Colerick, they are not found in my bailiwick. Sheriff's fees," etc., and signature of sheriff. "Served as commanded on D. H. Colerick, January 23, 1844. Not found as to the other defendants. Service," etc., and signature. The bill was dismissed as to Coquillard. It is objected that these returns do not specify the manner of service, and claimed that they should do so with particularity.

It would have been well to have stated whether the service was upon the defendants personally or by leaving copies at their places of residence; but we think a legal service shown with reasonable certainty. The officer says he served the process on some, and could not find other of the defendants. The inference is that a personal service was made upon those found.

3. It is argued that the contract sought to be specifically en-

forced is too vague to sustain the bill. The following is a copy of it:

"I have this day sold my lot to Alexis Coquillard on the plat in the town of South Bend; on the plat of said town on the river bank. I have received value, and will make the deed as soon as convenient. August 11, 1835. D. H. Colerick. Attest: H. R. Colerick."

This memorandum contains the names of the parties, acknowledges the reception of the consideration, thus rendering it immaterial that its amount or character should be particularly stated, and describes the property sold, not with the utmost certainty it is true, but so that it could be identified; and parol evidence for that purpose would be admissible. Such evidence would not be required in this case to make out the terms of the agreement, but to apply the agreement to the subject-matter of it. The thing sold was Colerick's lot on the river bank in the town of South Bend. The written contract assumed that he had one lot on said bank in said town, and implied that he had but one. Which was it? was the only remaining question to be settled. This question could be easily answered from the data given for identifying the lot. And where a written instrument contains all the facts of a contract except such as may legitimately be proved by parol evidence, where there is a written agreement that instrument is sufficiently certain to be enforced. The bill, in this case, avers that Colerick had, at the date of said agreement, one lot, and but one, in said town, and that it was lot No. 94, for which a conveyance was sought in this suit. We think the bill sustainable.

4. As we have stated, the final decree in this cause was taken *pro confesso* on default; and it is urged that the court erred in not requiring proof of the allegations in the bill before the rendering of such a decree. There is not a uniformity in the practice of courts upon this point. See the cases collected in 1 Daniell's Ch. Pr., Perkins' ed., in notes on page 577. But a line of decision has been pursued in this state long enough to settle the rule here. That rule, we think, may be stated to be, that where the bill is against adult residents of the state, who are personally served with notice, and the allegations of the bill are certain—especially if the subject-matters of those allegations are of a definite and certain nature—a final decree, after a decree *pro confesso*, may be rendered without proof. Thus broadly, at any rate, we are safe in laying down the rule, and so laid down, it includes this case. Here every material allegation in the bill, except as

to the number of the lot, was supported by the agreement in writing, copied into the bill; and as to the number of the lot, the allegation was certain and the subject-matter of it was of a definite character: See *Pegg v. Davis*, 2 Blackf. 281; *Platt v. Judson*, 3 Id. 235; *Fellows v. Shelmire*, 5 Id. 48; *Close v. Hunt*, 8 Id. 254; *Trimble v. White*, 2 Ind. 205; *Bowman v. Hall*, Id. 206.

5. The fifth point raised is, that no decree could be rendered in the case till Coquillard was made a party. He was the first assignor of the instrument on which the bill was founded. By our statute, the assignment of such an instrument carries with it a legal title, and not a mere equity, and Coquillard does not appear to have any further interest in that question. We think, therefore, that though a proper he was not a necessary party. Our statute (R. S., sec. 41, p. 839) enacts that "if the defendant, at the hearing of a cause, object that the suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it think fit, shall be at liberty to make a decree saving the rights of the absent parties."

No rights of Coquillard can be prejudiced by the decree rendered in this case, and no objection was made below.

The decree is affirmed with costs.

PAROL EVIDENCE, ADMISSIBILITY OF, TO SUPPLY OMISSIONS IN CONTRACT: See *West v. Kelly*, 54 Am. Dec. 192, and cases cited in the note; *Inglebright v. Hammond*, 53 Id. 430, and note; *Baldwin v. Carter*, 42 Id. 735, and note. The principal case is cited to the point that an extrinsic fact averred in a bill for specific performance, in explanation and support of the memorandum, may be proved by parol, in *Torr v. Torr*, 20 Ind. 123; *Guy v. Barnes*, 29 Id. 104; *Baldwin v. Kerlin*, 46 Id. 432.

RETURN OF SERVICE IS ONLY PROPER EVIDENCE of what has been done by the officer, and no omission therein may be supplied by other proof: See *Fairfield v. Paine*, 41 Am. Dec. 357, and note citing prior cases.

CERTIORARI TO CORRECT TRANSCRIPT NEVER AWARDED TO SUPPLY MATTER FOR REVERSAL: *Auditor v. Woodruff*, 33 Am. Dec. 368, and note citing prior cases. The principal case is cited to this point in *Cluck v. State*, 40 Ind. 266; *Kesler v. Meyers*, 41 Id. 555.

IN SUIT BY SUBPURCHASER FOR SPECIFIC PERFORMANCE, the intermediate vendors through whom he has acquired his equity are generally necessary parties: *Henderson v. Pickett's Heirs*, 16 Am. Dec. 130.

SPECIFIC PERFORMANCE WILL NOT BE DECREED UNLESS TERMS OF CONTRACT ARE CLEAR AND CERTAIN: *Robbins v. McKnight*, 45 Am. Dec. 406, and note collecting prior cases.

JUDGMENT BY DEFAULT WHEN DEFENDANT NOT SERVED ERRONEOUS: *Ditch v. Edwards*, 26 Am. Dec. 414.

YOST v. SHAFFER.

[3 INDIANA, 331.]

COURT OF EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND when the vendor has fraudulently misrepresented the number of acres contained in the tract.

VENDOR OF LAND CAN NOT DEPRIVE VENDEE OF HIS RIGHT TO HAVE CONTRACT FOR SALE THEREOF rescinded in equity because of the vendor's fraudulent misrepresentations as to the quantity of land sold, by afterwards purchasing and offering to convey to the vendee an adjoining tract sufficient to make up the deficiency.

ERROR to the Henry circuit court. The opinion states the case.

J. Rariden and J. S. Newman, for the plaintiff in error.

J. Perry and J. B. Julian, for the defendant in error.

By Court, SMITH, J. This was a bill in chancery, filed by the defendant in error against the plaintiff in error, to obtain the rescission of a contract for the sale by the latter to the former of a certain tract of land, upon the ground that the vendor fraudulently misrepresented the number of acres contained in the tract. The decree was in favor of the complainant.

The answer of Yost, as to his knowledge of the quantity of land in the tract sold to Shaffer, is equivocal, and we think it is sufficiently proved by the admissions in the answer, and by the depositions, that he did intentionally misrepresent the number of acres constituting the farm. The farm sold to Shaffer consisted of several smaller tracts which Yost held by separate deeds, all of which deeds were in his possession, and he must have known by the descriptions contained in them, and by the number of acres he paid taxes for, that the whole farm contained a much less quantity of land than one hundred and eighty acres.

It appears that, after the contract with Shaffer, Yost purchased or contracted with one McMullen for an adjoining tract, which he then offered to convey to Shaffer, in order to make up the quantity he had represented the farm sold to the latter to contain, but such an offer as this does not place him in any better position to enforce his original contract.

We are of opinion that the decree is right.

The decree is affirmed, with costs.

INTENTIONAL MISREPRESENTATION WILL AVOID CONTRACT where parties have not equal access to information: *Mitchell v. Zimmerman*, 51 Am. Dec.

717, and note citing prior cases. In *Gatling v. Newell*, 9 Ind. 580, the principal case is cited to the point that evidence is admissible in case of fraudulent misrepresentation of value of property sold to show its intrinsic value.

McCARTNEY v. STATE.

[3 INDIANA, 353.]

INDICTMENT FOR FORGERY WILL NOT BE QUASHED ON GROUND that it does not charge that the forged bank bill alleged to have been passed was passed as a true one, when it does charge the bill to have been uttered and paid as true.

NAMES OF PERSONS WHO ARE COMPETENT JUDGES OF GENUINENESS OF BANK BILLS may be ascertained by the prosecuting attorney from a witness upon the trial of an indictment for forgery in passing a counterfeit bank bill.

UTTERING OF OTHER COUNTERFEIT BANK NOTES OF SAME AND OTHER BANKS may be given in evidence on the trial of an indictment for passing a counterfeit bank note to show guilty knowledge, although indictments have been found upon such utterings and convictions or acquittals had upon them.

DECLARATIONS OF DEFENDANT MADE AT TIME OF PASSING OTHER COUNTERFEIT BANK NOTES than that charged in the indictment are admissible as part of the *res gestæ*.

COURT MAY INSTRUCT JURY THAT IF THEY ARE SATISFIED THAT NOTE described in an indictment for forgery in passing it was forged and false, no proof is necessary of the existence of the bank upon which it purported to be.

ERROR to the Marion circuit court. The opinion states the case.

R. L. Walpole, for the plaintiff in error.

D. S. Gooding, for the defendant in error.

By COURT, PERKINS, J. Indictment for forgery. Conviction in the circuit court. The points made are:

1. Whether the court erred in refusing to quash the indictment on the ground that it does not charge that the forged bank bill, alleged to have been passed, was passed as a true one. There was no error in refusing for this reason to quash, as the indictment does charge the bill to have been uttered and paid as true.

2. Whether the court erred in permitting the prosecuting attorney to ascertain from a witness on the stand the names of persons who were competent judges of the genuineness of bank bills. There was no error in this.

3. Whether the court erred in permitting proof on the trial

to show knowledge on the part of the defendant of the falsity of the bill described in the indictment, that, on the day said defendant passed the bill, and on the day following, he passed to other persons counterfeit bills on the same and other banks, for the passing of which other indictments had been found, some of which were pending, and on one of which he had been tried and acquitted. The law is well settled that the uttering of other counterfeit notes of the same kind with that charged in an indictment, and about the time that it was passed, may be given in evidence, on the trial of the indictment, to prove guilty knowledge: 1 Russ. on Cr. 85; 2 Id. 384, 697. We can see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings. Neither the indictments nor the records of conviction or acquittal need be, nor, it strikes us (though the point is not for decision in this case), should be, given in evidence; but the facts and attendant circumstances alone of the utterings, as though no indictments had been found. Nor do we think that the fact that some of these other counterfeit or false bills, purported to be upon banks different from that on which the indictment being tried was based, should render the evidence inadmissible. It might affect its force, but not, we think, its competency. The fact that a person had passed one counterfeit note on the State Bank of Indiana about the time of his passing one such note on the State Bank of Ohio might tend, but in a very slight degree, to prove that the person knew the Ohio note to be counterfeit; but if a person should pass several counterfeit notes on the State Bank of Indiana about the time he should pass, or be in possession of, counterfeit notes on the Ohio or any other bank, every one would say, according to the usual rules of judging of human conduct and intentions, that it conduced strongly to show that the party knew all his counterfeit paper to be such, and that he was making a business of passing such paper. We think the evidence in question admissible to prove guilty knowledge, but its weight with the jury would, of course, depend on the circumstances of the case: See *United States v. Roudenbush*, 1 Baldw. 514; *State v. Houston*, 1 Bail. L. 300; *Spencer v. The Commonwealth*, 2 Leigh, 751; *State v. Petty*, Harp. L. 59.

4. Whether the court erred in permitting proof of what the defendant said, at the time of passing each of said notes, in regard to it. There was no error in this. His declarations were a part of the *res gestæ*.

5. Whether the court erred in giving the following instruction to the jury: "If the jury are satisfied that the defendant uttered in payment and put away the note described in the indictment, that it was forged and false, and that the defendant knew it to be so, and put it upon the person named in the indictment with intent to defraud him, no other proof is necessary of the existence of the bank upon which it purported to be."

Our statute says, page 967, section 28, that every person who shall utter or pay, etc., "any false, forged, or counterfeit bank note," etc., shall be deemed guilty of forgery. The note would certainly be false if there was no such bank in existence as that on which it purported to be. This point, however, is settled by authority in accordance with the instruction in question: *The People v. Peabody*, 25 Wend. 472; note to R. S. 966; *United States v. Mitchell*, 1 Baldw. 366. The court committed no error.

The judgment is affirmed, with costs.

EVIDENCE OF SCIENTER ON TRIAL OF INDICTMENT FOR PASSING COUNTERFEIT BANK BILLS: See *State v. Spalding*, 48 Am. Dec. 158, and note citing prior cases. The principal case is cited in *Lane v. State*, 16 Ind. 14, to the point that evidence of possession by the defendant of other counterfeit bank bills upon other banks than that of the bill set forth in the indictment is admissible.

INDICTMENT IS NOT QUASHED IN DOUBTFUL CASE: See *Commonwealth v. Eastman*, 48 Am. Dec. 596.

DECLARATIONS OF DEFENDANT CONCERNING OTHER COUNTERFEIT MONEY: Evidence was held admissible of the prisoner's conversation with a party who had passed other counterfeit money, in order to show his knowledge of its character: *State v. Smith*, 5 Am. Dec. 132. The principal case is cited to the point that defendant's declarations while passing other counterfeit bills are admissible to show guilty intent, in *Strong v. State*, 86 Ind. 218.

FALSITY OF BANK BILLS ALLEGED TO HAVE BEEN UTTERED IS PROVABLE, without proving the existence of the bank on which they purport to issue. The principal case is cited to this effect in *Jones v. State*, 11 Ind. 360.

CONWELL v. STATE.

[3 INDIANA, 387.]

OWNER OF PART OF REVERSION OR REMAINDER OF LAND, between whom and another a suit is pending involving a question of waste or improvements, may go upon the premises in a peaceable manner, with witnesses, to examine the same.

ERROR to the Franklin circuit court. The opinion states the facts.

G. Holland and J. D. Howland, for the plaintiffs in error.

D. D. Jones and J. Ryman, for the defendant in error.

By Court, SMITH, J. This was an indictment for riot. The indictment charges that on, etc., at, etc., Conwell and five others did unlawfully, riotously, etc., assemble together to disturb the peace, and did make a great noise, riot, etc., and did riotously, etc., strike, beat, etc., one Smith, in the peace of the state, etc. The defendants pleaded not guilty. Conwell and two of the other defendants were found guilty and fined, and three of the defendants were acquitted.

The record does not contain the evidence, but a bill of exceptions states that the defendants requested the court to charge the jury that "if Conwell owned a part of the reversion or remainder of the land in dispute, and there was a suit pending between himself and Hedrick, involving a question of waste or improvements, Conwell was authorized to go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same," and that "there was evidence in the case authorizing said charge;" but the court refused to give it.

Not having the evidence before us, we can not estimate what effect this instruction would have had upon the result of the trial, but we can see no objection to it as an abstract principle of law, and, from all that appears, we think it should have been given.

The judgment is reversed. Cause remanded, etc.

POWELL v. NORTH.

[3 INDIANA, 392.]

DEATH, AS GENERAL RULE, DISSOLVES PARTNERSHIP.

COURT OF EQUITY HAS POWER TO AUTHORIZE CONTINUANCE OF PARTNERSHIP, after death of a partner, in behalf of the infant children of the deceased partner.

PROBATE COURTS OF INDIANA POSSESS GENERAL EQUITY POWERS in relation to the administration and guardianship of estates.

ORDER OF PROBATE COURT TO GUARDIAN OF INFANT HEIRS OF DECEASED PARTNER to expend his ward's property, without limiting the amount, in the completion of their part of an unfinished distillery, authorizes a reasonably prudent expenditure of the requisite sum for that purpose.

ADMINISTRATOR HOLDING PROPERTY OF DECEDENT'S INFANT HEIRS, whose guardian has been authorized by court to make a reasonable and prudent expenditure of such property for a certain purpose, and has directed the administrator to so expend the same, should receive credit in his settlement.

ment for the money which he expends for that purpose with reasonable care and judgment.

ERROR to the Ohio probate court. The opinion states the case.

A. C. Downey and P. L. Spooner, for the plaintiff.

D. Kelso, for the defendants.

By Court, PERKINS, J. Bill on the chancery side of the Ohio probate court, by William H. Powell, administrator upon the estate of Levi North, deceased, against Joseph T. North et al., complaining that on the tenth day of May, 1845, said Powell and said North, deceased, were partners in milling and merchandising, said Powell owning one third and said North two thirds of the real and personal property invested, and sharing in said proportions in the profits of the concern; and that, on the day aforesaid, said Levi North sold—the plaintiff, Powell, it seems, consenting—to one Thomas J. North one half of his two thirds of said entire property, whereby the firm was made to consist of the plaintiff, Powell, Levi North, and Thomas J. North, each owning one third of the joint property; that said firm, thus constituted, agreed to erect a distillery, commenced it, and expended two thousand four hundred dollars, being eight hundred dollars by each member, when, the distillery being unfinished, in August, 1845, said Levi North departed this life, and the plaintiff, Powell, was appointed his administrator, and ordered by the Ohio probate court to expend, as such, for said Levi's estate, the further sum of five hundred and thirty-three dollars on said distillery, which was done; that said Levi North left heirs, some adult and some infant; that in November, 1845, James and Abijah North, the guardians of the infant heirs, filed in the Ohio probate court, a petition representing that said Levi, living, was one of the firm of North, Powell & Co., which firm undertook to build and put in operation a distillery, and join the same to the steam mill owned by said company; that, in pursuance of said undertaking, said Levi spent, as his proportion, eight hundred dollars, and died, leaving said distillery unfinished; that, since his death, the surviving partners had expended about one thousand two hundred dollars more, nearly completing the building; and that, unless said heirs finished and owned their third of said establishment, it would be difficult for the petitioners and said Powell and Thomas J. North to keep correct books between them, as all the grain consumed by said distillery would be ground by said mill; and further

stating that the eight hundred dollars expended in said Levi's life-time would be lost to said heirs unless they completed their portion of said undertaking, as no person would purchase their interest in the distillery separate from their interest in the steam mill, and that said distillery, situated as it was, connected with a steam mill that consumed annually about one hundred thousand bushels of grain, with a full supply of water to run both, without hauling, the year round, would be profitable to the heirs.

An order was prayed to expend a sufficient sum to complete the heirs' part of said distillery, together with all other necessary buildings and appendages; and it was averred that there was a sufficiency of personal effects for that purpose. The court made the order accordingly, without limiting the amount to be expended. The distillery was thereupon completed, with necessary additional buildings and appendages—so the present bill states—the whole costing about ten thousand dollars, the administrator, Powell, making the expenditures on behalf of the heirs out of money in his hands, with the assent and under the order of said guardians and adult heirs, to the amount of two thousand five hundred and thirty-three dollars. The bill further states that said probate court authorized the continuance of the business of the firm, the share of the heirs remaining invested, and that it was continued till the seventeenth of September, 1846, but resulted in a loss, all of which was borne by the plaintiff personally; that at the death of Levi North, a true account of the personal property of said firm was taken, amounting to one thousand four hundred and seventy-nine dollars and fifty-one cents, one third of which, being four hundred and ninety-three dollars and seventeen cents, belonging to said heirs of North, and at the final closing of said partnership business in September, 1846, the personal property of said firm was sold for four thousand two hundred and eighty-six dollars and ninety-one cents, one third of which was secured to said heirs, etc.; that, after the winding up of the concern in September, 1846, partition was made of the real estate as improved by the expenditure of the money hereinbefore mentioned, said heirs receiving one third of the property. The plaintiff further alleges that he had been cited to make settlement, as administrator, in said Ohio probate court; that he had received for the estate of the deceased North five thousand and seventy-seven dollars and twenty-one cents, and paid out for debts one thousand four hundred and forty-one dollars and thirty-four cents,

and the two items of five hundred and thirty-three dollars and two thousand five hundred and thirty-three dollars on said distillery, etc.; and had distributed nine hundred and forty-eight dollars and eighty-six cents among the heirs. Prayer that the plaintiff might be credited with said sums in his settlement.

A guardian *ad litem* was appointed for the infants. A part of the defendants made default and a part demurred to the bill. The court sustained the demurrer, but proceeded to decree against the administrator that he should pay over the item of two thousand five hundred and thirty-three dollars, alleged to have been expended on the distillery.

This proceeding seems to have been treated by the probate court as a mixed one, partaking of the character of a bill in chancery and an answer to a citation for a settlement. Whether evidence was produced or not does not appear; but the court seems to have decided on the demurrer to the bill that the administrator could not be credited, in his settlement, with said item of two thousand five hundred and thirty-three dollars expended in and about the distillery; and it is manifest from the arguments of counsel that the point of controversy in the cause was upon the right of the administrator to such a credit. That point, therefore, we shall decide upon the supposition that said sum was so expended.

Death, as a general rule, dissolves a partnership; but a court of equity has power to authorize its continuance on behalf of infants: *Thompson v. Brown*, 4 Johns. Ch. 619. Our probate courts possess general equity powers in relation to the administration and guardianship of estates. It was within the power of the Ohio probate court, therefore, to permit, as it is alleged in this case that it did, a continuance of the partnership, and to order the completion of the distillery, etc. That order was a protection to the party in a reasonably prudent expenditure of the requisite sum for that purpose. The order in question was to the guardians of the infants; but the money to be expended was in the hands of the administrator, Powell; and had the guardians required and received it from him, he would have been entitled to a receipt from them which would have been a voucher in his settlement. Instead of calling upon him for the money, they, in connection with the adult heirs, who were competent to consent to the continuance of the partnership and the expenditure of the money in their own behalf, directed said administrator to expend the same, and so far as he did it with reasonable care and judgment, it seems to us he

should receive a credit in his settlement. If the money was not in fact laid out by him, of course he should not receive a credit for it. The evidence at the hearing should settle this point. The court should have taken an account in the case as to the amount and manner of expenditure, and settled with the administrator accordingly.

The decree is reversed, with costs. Cause remanded, etc.

POWER OF COURT OF EQUITY TO APPOINT PERSON TO CONTINUE PARTNERSHIP for benefit of infant heirs of deceased partner. The death of a partner dissolves the partnership although it were formed to continue for a fixed term of years, unless there is an express stipulation in the partnership articles providing for its continuance after the decease of a partner: *Scholefield v. Eichelberger*, 7 Pet. 586; *Knapp v. McBride*, 7 Ala. 19; *Remick v. Emig*, 42 Ill. 342; *Powell v. Hopson*, 13 La. Ann. 626; *Goodburn v. Stephens*, 5 Gill, 1; *Marlett v. Jackman*, 3 Allen, 287; *Jenness v. Carleton*, 40 Mich. 343; *Ames v. Downing*, 1 Bradf. 321; *Smith's Estate*, 11 Phila. 131; Collyer on Part., sec. 103; Ewell's Lindley on Part. 231; Story on Part., sec. 199-201, 317. But a partner may provide by will for the continuance of the partnership after his decease, and if the surviving partner assent, the partnership may be continued: *Burwell v. Mandeville*, 2 How. 560; *Vernon v. Vernon*, 7 Lans. 493; *Davis v. Christian*, 15 Gratt. 11. Mining partnerships are an exception. As there is no *delectus persone*, the death of a partner does not work a dissolution: *Taylor v. Castle*, 42 Cal. 367. Therefore an executor or administrator or guardian, who, in the absence of a stipulation in the articles of copartnership, or provision in the will of the deceased partner to that effect, continues or embarks the assets of the decedent in the firm, may render himself personally liable in case of a loss: *Wedderburn v. Wedderburn*, 22 Beav. 84; S. C., 2 Keen, 722; 4 Myl. & Cr. 41; 1 Story's Eq. Jur., 12th ed., sec. 676 b; Ewell's Lindley on Part. 976. But it is within the recognized powers of equity to appoint a person to carry on the partnership for the benefit of the infant heirs of the decedent partner. Although a diligent search of the authorities has failed to discover another recorded instance besides the principal case in which this power has been exercised, it has also failed in revealing a case in which it has been denied. And several instances have been found in which the principle has been recognized as well established. In *Thompson v. Brown*, 4 Johns. Ch. 619, the authority relied upon in the principal case, the administrator did not act under an order of a court of equity, but the chancellor said *inter alia*: "It is said that the court of equity will sometimes appoint a person to carry on a trade for the benefit of an infant partner: Montagu on Part. 187, and *Sayer v. Bennet*, there cited; and Lord Mansfield, in the case of *Barker v. Parker*, 1 T. R. 295, observed that he remembered many instances of trade being carried on under the direction of the court of chancery." *Sayer v. Bennet*, cited in Montagu on Partnership at page 18 of the notes to volume 1 of the first American edition, New York, 1824, was a case where a bill was brought to dissolve a partnership on the ground of the lunacy of one of the members, and is one of the first cases, if not the first, which decides that dissolution may be decreed on that ground. It was urged by counsel for the defendant that the case should be considered as that of an infant, and that as the court would carry on a trade for the benefit of an infant, so it should also for the benefit of a lunatic. Lord Ken-

yon, the master of the rolls, said: "It is said that equity should appoint some person to carry on the business for the benefit of the lunatic as they would have done for an infant, but I say, God forbid. Mr. Sayer would certainly never have entered into this partnership if he had conceived that by so doing he should in any event have subjected his business to the management and control of equity." *Id.* 20. This case is also reported in 1 Cox C. C. 107, and as there reported, the master of the rolls says: "It appears that few people care to leave the management of their property to other persons; and as a lunatic has no power of managing his own property, so a court of equity will not deliver it to persons to whom the party himself has not committed it. * * * As to what is said with respect to a substitute for defendant, that is what Sayer never intended by the partnership; he never meant to take a partner from a court of equity." Lord Mansfield, in *Barker v. Parker*, 1 T. R. 295, cited in *Thompson v. Brown*, *supra*, said: "If executors carry on a trade, they must do it as individuals for their own advantage. I remember many instances of trade being carried on under the direction of the court of chancery. But this [*i. e.*, the case there under discussion] is quite a new thing. * * * All the accounts relative to the transaction in the life-time of the testator were settled. This is a new agreement made by the executors personally, and can not affect the assets of the testator."

Mr. Parsons, speaking of the continuation of the partnership after the death of one partner, says: "In this country, a person may be appointed by equity to carry on a business for the benefit of an infant partner [citing the principal case and the authority therein relied on, *Thompson v. Brown*, 4 Johns. Ch. 619], and doubtless an English court of equity has this power; and although we know of no case in which it has been exercised, there are cases in which reference is made to this power [citing *Sayer v. Bennet*, *supra*; *Barker v. Parker*, 1 T. R. 295, *supra*]. But we do not think that a person so appointed by the court would be held, unless a liberal compensation were made to him, subject to the stringent liabilities which, according to the authorities, would seem to attach to an executor who carries on the business in this way:" Pars. on Part. 455. That is, without the authority of court. In *Hoyt v. Sprague*, 103 U. S. 613, 630-636, it is held, that in the absence of constitutional restraint, the legislature may pass special laws for the sale or investment of the estates of infants or other persons who are not *sui juris*, and an administrator who was also appointed guardian of the minor heirs, and who, by virtue of such a special law and by order of the probate court conveyed the property of the infants to a manufacturing corporation, by way of investment, had full power and authority to do so, and was answerable only for the shares of capital stock and dividends realized thereon. This decision, however, was based rather upon the authority of the legislature to pass such an act than upon the power of the court to appoint the person.

DOE EX DEM. CLENDENNING v. LANIUS.

[3 INDIANA, 441.]

NAKED POWER TO EXECUTOR TO SELL LANDS FOR PURPOSE OF PAYING LEGACIES or making distribution does not vest any title to the land in the executor. To cut off the heir at law, the estate must be devised expressly or by implication to another.

LEGAL ESTATE WILL BE DIVESTED MOMENT EXECUTOR EXECUTES POWER to sell lands and distribute proceeds, but until sale is made, the heir is entitled to the possession and profits.

DEVISE TO EXECUTORS CAN NOT BE IMPLIED, unless such devise is necessary to give effect to the intentions of the testator.

ERROR to the Franklin circuit court. The opinion states the case.

J. D. Howland and J. Ryman, for the plaintiff.

G. Holland, for the defendants.

By Court, SMITH, J. Ejectment by the heirs at law of Nixon Oliver against his executors. The action was commenced on the sixth of October, 1849, and resulted in a judgment for the plaintiff.

The cause was submitted to the court, without a jury, upon an agreed statement of the facts.

By that statement it appears that Nixon Oliver died, leaving a will, which was admitted to probate on the fifth of March, 1849. The will commences in the following words: "As to such goods as Almighty God has blessed me with, I devise and bequeath as follows, viz.: I desire and will that the hereinafter-described parcel of land shall, within one year after my decease, be sold for cash payments by my executors, that I may the better carry out my purposes and designs, namely, all the land owned by me north of the turnpike road, situated in the county of Franklin and state of Indiana, and known and described as follows: [here follows a description of a part of the south-east quarter of section No. 20, etc., by metes and bounds, containing one hundred and ten acres.] The above-described premises, when sold and converted into cash, as already provided for, I desire and will to dispose of in the following way and manner, viz.: I will and bequeath to my half-brother William Oliver's son, John Oliver, three hundred dollars; to my half-sister, Mary Ann Oliver, one hundred dollars [here follow bequests to several other relatives of different sums of money]; each and all of the above-named persons being now in Ireland. I give and bequeath to Mary Cooney, now in America, near Adamsville, Ohio, one hundred dollars. I also desire and will that should the above-described tract or parcel of land sell for more than the several gifts above mentioned, together with the expenses of my funeral, the furnishing a suitable tombstone, and the expenses of settling up my estate, then, in that case, all the above-named

persons, both in Ireland and America, shall, in proportion to their several amounts, receive the residue, be it little or much."

The will then directs that all the lands of the testator situated south of said turnpike shall be sold by his executors to pay legacies to certain relatives residing in the United States.

The defendants in this suit were appointed executors by the will, and they were duly qualified. The lessors of the plaintiff are the heirs at law of the testator residing in the United States.

The main question in the case is, whether, by the terms of the will, a right to the possession of the premises in controversy, they being the land owned by the testator north of the turnpike road, was given to the executors.

We think it is well settled by the current of American as well as of English decisions, that a mere direction to an executor to sell lands for the purpose of paying legacies or making distribution, does not vest any title to the land in the executor. To cut off the heir at law, the estate must be devised expressly, or by implication, to some other person. This question was discussed at considerable length, and numerous cases are cited in the case of *Jackson v. Schaubert*, 7 Cow. 187, in the supreme court of New York, and also in the same case in the court of errors of that state: *Schaubert v. Jackson*, 2 Wend. 13.

There are cases in which, because the general objects of the will could not be otherwise carried into effect, the courts have sought out particular expressions in the will for the purpose of enabling them to give the estate to the executor by implication; but where there is merely a naked power to sell the estate and distribute the proceeds, it is not necessary that the executor should have the title to the estate to enable him fully to carry into effect the intentions of the testator. In that case, the legal estate will be divested the moment the executor executes his trust, but in the mean time, and until a sale is made, the heir is entitled to the profits.

In the will given in evidence in the present case, there is no express devise of the land in controversy to any person, and as a devise to the executors can not be implied from the necessity of such a devise to give effect to the intentions of the testator, the legal title descended to the heirs at law, and they were entitled to retain possession until the powers given to the executors were executed.

The judgment is affirmed, with costs.

McIntire v. Cross, decided at the same term with the principal case, and reported in 3 Ind. 444, was a case involving the same principle, and the opinion was delivered by the same judge, who referred to the principal case as authority. It is even a stronger authority for the general proposition that the course of descent of an estate to the heirs at law can be interrupted only by a devise to some other person; for in this case, although the necessary devise was wanting, the intention of the testator to so interrupt the descent was expressed in a written instrument, in the form of a will, and in the strongest terms. The children of Samuel T. Cross and Emily Cross, the daughter of John McIntire, deceased, petitioned the circuit court for a partition of certain lands of which John McIntire died seised, and joined as defendants the other heirs at law of the deceased. The petition alleged that the decedent died intestate, and prayed the partition on the ground that the petitioners, together with the defendants, were his heirs at law, and entitled to their share of the realty. The defendants joined in a plea which denied the intestacy of the decedent, and set forth the instrument averred as the will. A demurrer to this plea was sustained, and to this action of the court below error was assigned. The alleged will was a mere statement by the decedent that he and his wife had, by deed, conveyed to the petitioners a certain tract of land, for the consideration of love and affection, and with the intention of advancing to them, his daughter's children, that proportion of his estate which he intended they should have as heirs or distributees of his estate after his decease, and in lieu of every such right or claim; and that in order to perfect that intention, and avoid future litigation, he had made and published this instrument as his last will and testament. Then followed a reiteration of that intention in very urgent language. But the instrument contained nothing further, except a formal execution. No other devise or bequest whatever was expressed. Smith, J., in delivering the opinion, said: "It is very clear that the will was made with the express intention of preventing them [the petitioners] from setting up such a claim, if we can ascertain the intentions of the deceased from that instrument. Certainly such an intention could not well be expressed in stronger language. But it is equally clear as a point of law, that the course of the descent of an estate to the heirs at law can only be interrupted by a devise to some other person, whatever may have been the intentions of the ancestor: See *Cleddenning v. Oliver's Ex'rs* [the principal case], at this term." The learned judge continued, that as there was no express devise, and no person mentioned to whom a devise might be implied, the instrument was a mere written statement of the maker's intentions, and of no more force than any other statement to the same effect which he might have made in his life-time. And he concludes: "He professes to make a will, but in fact does not, for he suffers all his estates to descend according to the law of descents, which he should not have done if he desired to make a different disposition of them." The demurrer was therefore correctly sustained.

POWER TO SELL LANDS GIVEN TO EXECUTOR vests in him interest in land, when: See *Lessee of Williams v. Veach*, 49 Am. Dec. 453, and prior cases collected in the note.

CITY OF NEW ALBANY *v.* MEEKIN.

[3 INDIANA, 481.]

SHARE OF PART OWNER OF STEAMBOAT OCCASIONALLY TOUCHING AT CITY in which he resides, but not enrolled or usually lying there, is not taxable there under a charter providing for the taxation of property within that city.

SITUS OF PERSONAL PROPERTY DOES NOT FOLLOW DOMICILE OF ITS OWNER for purposes of taxation.

APPEAL from the Floyd circuit court. The opinion states the case.

J. C. Moody, for the appellant

H. P. Thornton and C. Dewey, for the appellee.

By Court, PERKINS, J. The city of New Albany brought an action of debt against Charles Meekin to recover the amount of certain taxes assessed against him. Meekin pleaded the general issue. The cause was submitted to the court upon the following statement of facts agreed to by the parties: "Defendant is assessed by plaintiff with a tax of seventy-five dollars for the year 1850, and a tax of forty-six dollars and twenty-eight cents for the year 1851. Defendant is and has been for three years last past the owner of an interest in a certain steamboat of the value of — dollars. The other joint owners of said boat are not residents of the state of Indiana. Said boat was enrolled at Louisville, Kentucky, and has been, during said three years, running on the Ohio and Mississippi rivers, and occasionally touching at New Albany. When not running, said boat has been laid up at points not in said city. Defendant's joint ownership is fairly worth the sum of —, and said taxes have been regularly assessed as the proper percentage on said valuation. Defendant objects to the payment of said taxes, on the ground that said ownership above specified is not taxable by the plaintiff. It is agreed that if the court decide," etc. "*Moodey and Hillyer*, for plaintiff. *Thornton and Davis*, for defendant."

The court below decided for the defendant, and rendered judgment accordingly.

The charter of the city of New Albany, section 9, confers upon the "mayor and council" of the corporation the power "to assess annually, against each male inhabitant of the city, who shall be twenty-one years of age, sane, and not a pauper, a poll tax not exceeding fifty cents; and upon all lands, tenements, and hereditaments, goods and chattels, rights and cred-

its," "which are within the city, such *ad valorem* tax," etc.; and provides that the same shall, from the first Monday in April of each year, "be a lien upon the property so assessed, and a charge against the then owner thereof," etc.

The question in this case, it will be observed, is not what power of taxation the state might have given to the city of New Albany, but what she actually has given; for it will be admitted that the city can not exercise a power not conferred. The city has power to tax property situated within her limits; and we have only to determine, therefore, whether the steamboat in question, or the share of it belonging to the defendant, is thus situated. We shall not attempt to lay down a general proposition specifying what property is and what is not situated within the corporation of New Albany, but shall confine ourselves to the article in this suit subjected to taxation. And we think that neither the said steamboat nor the share of the defendant in it is within said city. It is certainly not actually there, and we think not constructively, within the meaning of the charter. We do not think that, for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards the *situs* as following the domicile of the owner. Surely no one would risk asserting the general proposition that, under the charter of New Albany, all the personal property owned by every resident of that city, no matter where situated, was liable to be taxed by said city; that if a citizen of New Albany was a partner in a steamboat plying on some river in California, or in a flock of sheep kept upon a farm in Kentucky, or in some part of Floyd county, in this state, out of the corporation of New Albany, he was liable to be taxed for it under said charter. The case before us can not be distinguished. We do not deny that the state might have authorized the city to tax such property, but we think she has not.

The judgment is affirmed, with costs.

PLACE WHERE PROPERTY MAY BE TAXED.—Taxation and protection are reciprocal: Cooley on Taxation, secs. 14, 15. When the state or sovereignty affords no protection to the property or its owner, it has no right to tax either. Taxation is an approximate compensation rendered by the inhabitants of a commonwealth or the owners of property situated within its borders for the protection afforded their persons or property by the government. No protection being afforded, no right to compensation exists. The right of taxation is a necessary adjunct of sovereignty, and as each state is sovereign, with the exception of those powers which it has granted to the general government, if it does not infringe upon these powers, its authority to tax prop-

erty and persons within its boundaries will then be limited only by its constitution. It must not pass laws imposing a tax upon interstate commerce, upon exports or imports, or impairing the obligation of contracts. As long as it does not trench upon the authority of the general government embodied in the constitution of the United States, or upon the prohibition of state legislation in certain cases therein contained, its powers of taxation are sovereign within its borders. The taxing power of a country must necessarily be limited to its territorial extent. Within the borders of one state or country another state or country has no taxing jurisdiction. But within its own boundaries the personal allegiance of the person or owner of the property taxed by the state has no necessary connection with the right of taxation. An alien may be taxed as well as a citizen: *Id.*; *Witherspoon v. Duncan*, 4 Wall. 210; *Supervisors of Tazewell County v. Davenport*, 40 Ill. 197. The forcible language of Lowrie, C. J., in *Finley v. City of Philadelphia*, 32 Pa. St. 381, is often quoted: "There is nothing poetical about tax laws. Wherever they find property, except what is devoted to public and charitable uses, they claim a contribution for its protection without any special respect to the owner or his occupation, and without reflecting much on questions of generosity or courtesy." The fiction that personal property follows the owner's domicile yields whenever it is necessary for purposes of justice that the actual *situs* of the thing be examined: *Green v. Van Buskirk*, 7 Wall. 139, 150. No property within a state is beyond the reach of the taxing power unless designedly put beyond it by an unequivocal act of the sovereign power: *Robertson v. Land Commissioner*, 44 Mich. 274. This power is confined to the actual limits of the taxing authority. Thus, the exercise of municipal authority by one town over a portion of the territory of another town, and the acquiescence of the latter for a period of more than twenty years, will not authorize the former to levy and collect taxes upon persons dwelling in that territory: *Ham v. Sawyer*, 38 Me. 37; see *McKay v. Batchellor*, 2 Col. 591. Double taxation is not unconstitutional: *State v. Brannin*, 23 N. J. L. 484; and is in fact often practiced in such cases as mortgages where both the mortgage and the property are taxed at their full value, or in case of a corporation when the capital stock and property of the corporation is taxed as well as the shares of the stockholders: See *infra*. There are cases which hold that the personal property of a resident, when actually situated beyond the limits of a state, is without its taxing jurisdiction, except vessels and choses in action: *Herron v. Keeran*, 59 Ind. 472, 477; *State v. Railway*, 24 N. J. L. 56; *St. Louis v. Ferry Company*, 40 Mo. 580; *Burridge on Taxation*, sec. 40; *Cooley's Const. Lim.* 500. But other authorities deny this, and hold that the resident owner is taxable upon his chattels, although they are situated and taxed in another state: *Leonard v. New Bedford*, 16 Gray, 292; *People v. Commissioners*, 33 Barb. 116; *Bemis v. Boston*, 14 Allen, 366. But the state can not tax interstate commerce or imports or exports: *State of Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; 11 Biss. 561; *Clarke v. Clarke*, 3 Woods, 408.

REAL ESTATE IS TO BE TAXED ONLY IN STATE WHERE SITUATED. It has never been claimed that it could be taxed elsewhere: *Burridge on Taxation*, sec. 40; *Cooley's Const. Lim.* 500. Land, though owned by non-residents of the state or county, is to be taxed in the taxing district wherein it is situated: *People v. Pearis*, 37 Cal. 259; *Rowe v. Blakeslee*, 11 Conn. 479; *Allen v. Gleason*, 4 Day, 376; *People v. Wilkerson*, 1 Idaho, N. S., 619, 622; *In re Des Moines Water Co.*, 48 Iowa, 324; *Edwards v. Beaird*, 1 Ill. 41; *Newburyport Turnpike v. Upton*, 12 Mass. 575; *Turner v. Burlington*, 16

Id. 208; *Lamprey v. Batchelder*, 40 N. H. 522; *Nashua etc. Bank v. Nashua*, 46 Id. 389; *Bowles v. Clough*, 55 Id. 389; *Pickering v. Coleman*, 53 Id. 424; *Van Rensselaer v. Cottrell*, 7 Barb. 127; *Van Rensselaer v. Witback*, Id. 133. An agreement between neighboring towns not to tax in one the lands of the inhabitants of the other is invalid: *Dillingham v. Snow*, 5 Mass. 547. The assessment of land in another township than the one in which it lies is void, though made in good faith: *Taylor v. Youngs*, 48 Mich. 268; *Toby v. Haggerty*, 23 Ark. 370; *Hubbard v. Newton*, 52 Vt. 346.

Provision is sometimes made by statute that where real estate lies partly in two counties, it shall be taxed in the county where the owner resides. The land must be situated wholly within the state in order that such a provision may be valid. The following cases construe statutes of that kind: *State v. Jewell*, 34 N. J. L. 259; *State v. Reinhardt*, 31 Id. 218; *State v. Hay*, Id. 275; *State v. Hoffman*, 30 Id. 346; *State v. Abbott*, 42 Id. 111; *State v. Britton*, Id. 103; *State v. Warford*, 37 Id. 397; *State v. Jones*, 39 Id. 246; *Saunders v. Springsteen*, 4 Wend. 429; *Dorn v. Fox*, 61 N. Y. 264; *Herston v. Stinson*, 13 Ired. L. 479; *Hughey v. Horrell*, 2 Ohio, 231; *Bausman v. Lancaster*, 50 Pa. St. 208. See *Barger v. Jackson*, 9 Ohio, 163. So land, especially when unoccupied or unimproved, is sometimes assessed under statute to the owner at the place of his residence, when he resides within another county of the state: *Oldtown v. Blake*, 74 Me. 280; *Pease v. Whitney*, 5 Mass. 380; S. C., 8 Id. 93; *Dorn v. Backer*, 61 Barb. 597; and under such a statute a corporation will be taxable upon its lands at its residence: *Salem Iron Factory v. Danvers*, 10 Mass. 514; *Amesbury Nail Factory v. Weed*, 17 Id. 53; *Amesbury Man. Co. v. Amesbury*, Id. 461; *Goodell Man. Co. v. Trask*, 11 Pick. 514. The statute empowers the assessor to assess such non-resident lands in the county where situated, if occupied by a tenant: *Johnson v. Learn*, 30 Barb. 616. Again, unseated lands are by statute assessed in county where situated; whereupon a payment of taxes in another county is no relief from a sale in the county where the land is situated: *Putton v. Long*, 68 Pa. St. 262. Where a part of a town is set off from the rest of the town before the assessment, that part is not liable to the municipal tax of the original town: *Richards v. Dagget*, 4 Mass. 534. Where land is brought within the city limits, it is liable to city taxation: *Butler v. City of Muscatine*, 11 Iowa, 433; but it must first be laid off and used as town property: *Morford v. Unger*, 8 Id. 82; *Langworthy v. Dubuque*, 13 Id. 86; *Covington v. Southgate*, 15 B. Mon. 491. But in *Cary v. City of Pekin*, 88 Ill. 154; S. C., 30 Am. Rep. 543, it is held that farming land within the city limits is liable to city taxation, although it derives no benefit. Movable machinery taxed in the town where it is situated is not thereby made real estate: *Steere v. Walling*, 7 R. I. 317.

Tax on Railroad Lands.—In some states railroad lands are taxed by the state alone as an entirety, and are not subject to taxation by the counties through which the road passes. But real estate not used in operating or running the road is taxed the same as that of private persons: *Osborne v. Hartford etc. R. R. Co.*, 40 Conn. 498; *Toledo etc. R. R. Co. v. Lafayette*, 22 Ind. 262; *Chicago, B. & Q. R. R. Co. v. Paddock*, 75 Ill. 616; *Applegate v. Ernst*, 3 Bush, 648. In other states such real estate is taxed upon the portion situated in each county or city, in the same manner as other real estate: *Huntington v. C. P. R. R. Co.*, 2 Saw. 503; *People v. Placerville etc. R. R. Co.*, 34 Cal. 656; *People v. McCreery*, Id. 459; *Mohawk R. R. Co. v. Clute*, 4 Paige, 384; *Orange etc. R. R. Co. v. Alexandria*, 17 Gratt. 176. But the tax may be assessed upon the proportion of the whole value of the road that its length within such municipality bears to the whole length of the road within the

state: *State Railroad Tax Cases*, 92 U. S. 575; *Hack v. Chicago etc. R. R. Co.*, 86 Ill. 352. But under a statute allowing the county to tax property within its limits, such a method would not be permissible: *Sangamon etc. R. R. Co. v. County of Morgan*, 14 Ill. 163; S. C., *ante*, 497. A railroad company is a resident of its lands in the towns and wards through which its road extends, and its lands are therefore not assessable as non-resident lands: *People v. Cassidy*, 46 N. Y. 46; *People v. Fredericks*, 48 Barb. 173.

Bridges Partly in Another State.—When a river which forms the boundary of two states, counties, or townships is bridged, the bridge is real estate, and that part of it within the boundary line of each state, county, or township is taxable there, whether the owner be a resident of the taxing jurisdiction or not: *Alexandria Canal etc. Co. v. District of Columbia*, 1 Mackey, 217; *Louisville Bridge Co. v. Louisville*, 16 Rep. 555; *O'Neal v. Virginia etc. Co.*, 18 Md. 1; *Cornish Bridge v. Richardson*, 8 N. H. 207; *State v. Metz*, 29 N. J. L. 122; *State v. Mutchler*, 42 Id. 461; *Hudson River Bridge Co. v. Patterson*, 74 N. Y. 365. A boom across a river is governed by the same rule: *Hall v. Benton*, 69 Me. 346. The jurisdiction of states as to real property is easily determined. But some difficulty arises, in solving this question, with respect to some species of personal property, owing to its movable, and in some cases intangible, nature. This is especially met with in the case of vessels and choses in action.

VESSELS TAXABLE AT THEIR HOME PORT.—Unless vessels have an actual *situs* elsewhere, they are taxable at their home port. This is never denied. The cases cited below all sustain this principle. The controversy arises upon what is the home port, and whether the vessels are also taxable elsewhere. The decisions as to what is the home port of a vessel are based upon section 4141 of the United States revised statutes, which provides that a vessel shall be registered in the district within which the port to which she belongs is, and defines the port to which she belongs as that port "at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner, of such ship or vessel usually resides." Therefore the home port depends upon the locality of the owner's residence, not upon the place of enrollment: *St. Louis v. Ferry Co.*, 11 Wall. 431, overruling S. C., 40 Mo. 580; *Hooper v. Baltimore*, 12 Md. 464; *Pelton v. Northern Transportation Co.*, 37 Ohio St. 450; *Mayor etc. v. Baldwin*, 57 Ala. 61; S. C., 29 Am. Rep. 712; *St. Joseph v. Saville*, 39 Mo. 460. Where they are owned by a corporation, the residence of the corporation is their home port, and there they are taxable, notwithstanding the corporation may have its office in another state: *St. Louis v. Ferry Co.*, 11 Wall. 431; *Transportation Co. v. Wheeling*, 99 U. S. 273; S. C., 9 W. Va. 170; S. C., 27 Am. Rep. 552; *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Pelton v. Northern Transportation Co.*, 37 Ohio St. 450. In Illinois it is held that the vessel is taxable at the place of registration, from and to which she regularly departs and returns, and where she lies up when not in use: *Wilkey v. City of Pekin*, 19 Ill. 160, citing the principal case; *Irvin v. New Orleans etc. R. R. Co.*, 94 Id. 105; S. C., 34 Am. Rep. 208; although the owner reside elsewhere: *Vogt v. Ayer*, 104 Ill. 583. The *situs* of sea-going vessels is the port of registration and residence of the owner. They have no *situs* elsewhere, and are taxable only at this *situs*: *People v. Commissioner of Taxes*, 58 N. Y. 242; *Hoyt v. Commissioner of Taxes*, 23 Id. 224; *Gunther v. Mayor*, 55 Md. 457. When the steamboat has no permanent location in the state where it is sought to be taxed, it can not be taxed there if its home port is not there: *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *State v. Haight*, 30 N. J.

L. 428; *People v. Niles*, 35 Cal. 282. Steamships belonging to a New York corporation, registered at New York and employed in the transportation of passengers between New York and San Francisco, and San Francisco and Oregon, are not liable to assessment in California or San Francisco, but are taxable at their home port in New York: *Hays v. Pacific Mail Steamship Co.*, 17 How. 596. A steamboat, though its home port be in New York, if used in navigation within the state of California, is liable to taxation in California: *Minturn v. Hays*, 2 Cal. 590; S. C., *ante*, 366; see *Battle v. Mobile*, 9 Ala. 234; S. C., 44 Am. Dec. 438. In *Pacific Mail Steamship Co. v. Board of Supervisors*, 50 Cal. 282, the question was discussed, but not decided, whether steamers registered and owned in New York were taxable in California. Enrollment elsewhere as a coaster will not change the *situs*: *Morgan v. Parham*, 16 Wall. 471. Upon an assessment of a tax of property within the limits of a city, a steamboat may be taxed, if that is its *situs* and home port and the owner resides there: *St. Joseph v. Sarille*, 39 Mo. 460. The fact that the owner resides elsewhere than within the city *prima facie* relieves the steamboat from taxation. But it would be otherwise if the vessel had an actual *situs* there. A mere stopping or touching of a ferry-boat daily at a town in its trips back and forth between that and another town which is its home port does not give it an actual *situs* in the former town. This is the rule of the principal case, and is well settled: *Mayor etc. of Mobile v. Baldwin*, 57 Ala. 61; S. C., 29 Am. Rep. 712; *St. Louis v. Ferry Co.*, 11 Wall. 431, overruling S. C., 40 Mo. 580; *State v. Haight*, 30 N. J. L. 428. See *People v. Niles*, 35 Cal. 582; *Wilkey v. City of Pekin*, 19 Ill. 160. Under statute providing for the taxation of partnership property at their place of business, a ship owned by the firm will be taxed there, and not at the residences of the individual partners: *Peabody v. County Commissioners*, 10 Gray, 97. A state law including steamboats as taxable property is not unconstitutional: *Perry v. Torrence*, 8 Ohio, 521; S. C., 32 Am. Dec. 725.

BONDS, SHARES, AND OTHER CHOSSES IN ACTION TAXABLE AT OWNER'S RESIDENCE. The question where choses in action shall be taxed has furnished the theme of much litigation. When the owner of the chose in action is domiciled in one state while the debtor is domiciled in another, the jurisdiction of each state may come into question. Is the chose in action taxable at the debtor's residence, at the creditor's residence, or at the residences of both? With respect to tangible personal property capable of having an actual *situs* of its own, the rule that personal property follows the owner's domicile does not govern taxation. Upon such property a tax may be levied wherever it is found permanently located. But mere evidences of debt are regarded as intangible, and as having no location except in connection with their owner or his agents.

Bonds and Shares of Stock.—Bonds, the evidences of public debt of another state, and shares of stock in foreign corporations, are taxable in the state in which the owner resides. Notwithstanding some controversy, this is now the well-settled law: *In re Ewin*, 1 Cr. & J. 150, 155; *In re Cigala Settlement*, L. R., 7 Ch. Div., 356; *Attorney General v. Bouwens*, 4 Mee. & W. 171, 190; *Bonaparte v. Appeal Tax Ct. of Baltimore*, 25 Alb. L. J. 172; S. C., 104 U. S. 592; S. C., 21 Am. Law Reg. 290, and note 292 (public debt); *City of Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connorsville*, 15 Id. 150; *Griffith v. Wilson*, 19 Kan. 23; *Holton v. Bangor*, 23 Me. 264; *Appeal Tax Court v. Patterson*, 50 Md. 354; *Appeal Tax Court v. Gill*, Id. 377 (public debt); S. C., 15 Rep. 173; *Great Barrington v. County Com'rs*, 16 Pick. 572; *Dwight v. Boston*, 12 Allen, 316; *Goldsbury v. Warwick*, 112 Mass. 384; *Howell v. Village of Cas-*

sopolis, 35 Mich. 471; *State v. Bentley*, 23 N. J. L. 532; *State v. Brawn*, Id. 484; *Newark v. Assessor*, 30 Id. 13; *Worth v. Com'rs of Ashe County*, 82 N. C. 420; S. C., 33 Am. Rep. 692; *Worthington v. Sebastian*, 25 Ohio St. 1; *Bradley v. Bander*, 36 Id. 28; S. C., 38 Am. Rep. 547; *Short's Estate*, 16 Pa. St. 63; *McKee v. County of Northampton*, 49 Id. 519; *Whitesell v. County of Northampton*, Id. 526; *Shakespeare v. Fidelity Co.*, 97 Id. 173 (U. S. bonds); *Orcutt's Appeal*, Id. 179 (U. S. bonds); *Dyer v. Osborne*, 11 R. I. 321; S. C., 23 Am. Rep. 460; *Hayne v. Dellesseline*, 3 McCord, 374; *Union Bank of Tennessee v. State*, 9 Yerg. 490. The United States may tax the capital of a state bank invested in foreign countries in the usual manner in which banks invest property: *Nevada Bank v. Sedgwick*, 104 U. S. 111. Although the foreign corporation be taxable and taxed at its residence upon its capital stock and property, nevertheless the stock is also taxable at the residence of the holder: *Griffith v. Wilson*, 19 Kan. 23; *Dwight v. Boston*, 12 Allen, 316; *Worthington v. Sebastian*, 25 Ohio St. 1; *Dyer v. Osborne*, 11 R. I. 321; S. C., 23 Am. Rep. 460; *contra*: see *Smith v. Erceter*, 37 N. H. 556; *Nashua Bank v. Nashua*, 46 Id. 389. So if the stock, bonds, or certificates of the debt of other states are exempt in the state wherein they are issued, still they are taxable at the owner's residence as his personalty. One state can not impair another's right to tax property within its limits: *Appeal Tax Court v. Patterson*, 50 Md. 354; *Appeal Tax Court v. Gill*, Id. 377; see *Holton v. Bangor*, 23 Me. 264, 267.

On the other hand, the power of taxation of a state is limited to the person's property and business within its jurisdiction. The above cases hold that foreign stock and bonds are within the jurisdiction of the state in which the holder resides. And the converse of this proposition is maintained by the weight of authority, that domestic stock and bonds, bonds and stock of resident corporations, are not taxable in the state of which the corporation is a resident or from which the stock and bonds issue, when owned by non-residents of that state: *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Waltham v. Inhabitants of Waltham*, 10 Met. 334; *State v. Ross*, 23 N. J. L. 517; *Commonwealth's Appeal*, 14 Rep. 183; *Union Bank of Tennessee v. State*, 9 Yerg. 490; *De Vignier v. New Orleans*, 16 Fed. Rep. 11; *Commonwealth v. Standard Oil Co.*, 15 Rep. 59; *Thompson v. Adv. General*, 12 Cl. & Fin. 17, 20; *Angell and Ames on Corp.*, sec. 458; see *Railroad Co. v. Jackson*, 7 Wall. 262. In some states it has been held, contrary to the weight of authority, that the legal situs of the stock of a corporation was the creating state, and therefore stocks of foreign corporations in the hands of residents could not be taxed: *People v. Com'rs of Taxes*, 5 Hun, 200 (but see other New York cases to the contrary below); *Vanner v. Calhoun*, 48 Ala. 178. So it is sometimes held that non-residents take shares of stock subject to the state right of taxation: *American Coal Co. v. County Com'rs of Alleghany*, 59 Md. 185; S. C., 15 Rep. 173; *Paxton v. McCosh*, 12 Iowa, 527, 530; *Danville Banking etc. Co. v. Parks*, 88 Ill. 170; see *Baltimore v. Baltimore City Pass. R'y Co.*, 57 Md. 31. This was the rule at one time in Pennsylvania, where it was held that a loan to corporation was taxable, though made and the bonds held by non-residents: *Cleveland etc. R. R. Co. v. Commonwealth*, 29 Pa. St. 370; *Mallory v. Reading etc. R. R. Co.*, 52 Id. 140; *Pittsburg etc. R. R. Co. v. Commonwealth*, 66 Id. 73; S. C., 5 Am. Rep. 344; *Susquehanna Canal Co. v. Commonwealth*, 72 Id. 72. But these cases were overruled in *State Tax on Foreign-held Bonds*, 15 Wall. 300, and since then the rulings of the courts of this state have been with the majority of authority: *Shakespeare v. Fidelity Co.*, 97 Pa. St. 173; *Orcutt's Appeal*, Id. 179; *Commonwealth's Appeal*, 14 Rep. 183; *Commonwealth v. Standard Oil Co.*, 15 Rep. 59. When a resident is not

liable to taxation on shares in domestic corporation, he will be exempt from taxes on foreign stock: *Trounbridge v. Commissioners*, 4 Hun, 595. Collateral security is not taxable to the pledgee: *Waltham v. Inhabitants of Waltham*, 10 Met. 334. Where federal officers and agents residing within certain limits are exempted from taxation, stock of a city without those limits held by them is also exempted: *Chauvenet v. Commissioners*, 3 Md. 259. It is held that state bonds acquire an actual *situs* within the state, and are taxable there, though owned by a foreign corporation, when they are deposited in that state, pursuant to a statute, as security for the liabilities of the corporation: *People v. Home Ins. Co.*, 29 Cal. 533. Bank stock of residents of state may, by special statute, be taxed at the location of the bank: *McLaughlin v. Chadwell*, 7 Heisk. 389. But not unless some statute has specially so declared: *Howell v. Village of Cassopolis*, 35 Mich. 471. See note on taxing shares of foreign corporations, 18 Am. Law Reg. 1.

Debts, Negotiable Instruments, Choses in Action.—The same rule prevails in case of debts, negotiable instruments, and other choses in action. They follow the domicile of the owner or creditor, and are taxable there: *Kirtland v. Hotchkiss*, 100 U. S. 491, affirming S. C., 42 Conn. 426; *People v. Eastman*, 25 Cal. 601, 603 (judgment foreclosing mortgage); *People v. Whartenby*, 38 Id. 461 (money at interest); *Kirtland v. Hotchkiss*, 42 Conn. 426; S. C., 19 Am. Rep. 546 (money lent); *City Council of Augusta v. Dunbar*, 50 Ga. 387 (bond); *Forseman v. Byrns*, 68 Ind. 247; *Hunter v. Supervisors of Page Co.*, 33 Iowa, 376, 379 (note deposited in another state); *Barber v. Farr*, 54 Id. 57 (moneys and credits); *Commonwealth v. Hays*, 8 B. Mon. 1 (debt); *Thomas v. Mason County Court*, 4 Bush, 135 (borrowed capital); *Hoyt v. Com'rs of Taxes*, 23 N. Y. 224. Unless a special statute provides otherwise, such property is to be taxed in the county where the owner resides: *People v. Park*, 23 Cal. 133; *People v. Eastman*, 25 Id. 601; *City Council of Augusta v. Dunbar*, 50 Ga. 387. A New York corporation paying installment upon a vessel built to their order have merely a lien, and until they become the owners the moneys paid on the contract are taxable in New York: *People v. Com'rs of Taxes*, 58 N. Y. 242. A resident partner's interest in a firm in another state is taxable: *Bemis v. Boston*, 14 Allen, 366. The creditor who has debts due him from residents of another state than that of his residence is not taxable in the state of the debtor's residence; the credits, not the debts, are taxable: *Murray v. Charleston*, 96 U. S. 432, 445; *Arrapahoe Co. Com'rs v. Cutter*, 3 Col. 349; *Collins v. Miller*, 43 Ga. 336 (promissory note); *Goldgart v. People ex rel.*, 106 Ill. 25; S. C., 21 Am. Law Reg. 624 (negotiable instrument); *Lanesborough v. County Com'rs*, 131 Mass. 424 (notes); *St. Paul v. Merritt*, 7 Minn. 258; *State v. Earl*, 1 Nev. 394. In *Thomas v. Mason County Court*, 4 Bush, 135, it was said that borrowed capital in Ohio is taxable to the borrower there, and the debt due is taxable to the lender in Kentucky.

Mortgages and Mortgage Debts are, according to the overwhelming weight of authority, taxable at the mortgagee's domicile. Like any other debt, they have no other *situs*, and the fact that the debt is secured upon land does not affect this principle: *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Kirtland v. Hotchkiss*, 100 U. S. 491; *People v. Eastman*, 25 Cal. 601, 603; *Kirtland v. Hotchkiss*, 42 Conn. 426; S. C., 19 Am. Rep. 546; *Arrapahoe Co. Com'rs v. Cutter*, 3 Col. 349; *Davenport v. Mississippi etc. R. R.*, 12 Iowa, 539; *State v. Pearson*, 24 N. J. L. 254; *State v. Manchester*, 25 Id. 531; *State v. Williamson*, 33 Id. 77; *State v. Bishop*, 34 Id. 45; *Redfield v. Supervisors of Genesee*, 1 Clarke Ch. 42. In Montana a mortgage is personal property, and therefore taxable wherever it may be found. And the court maintains

that as the record of the mortgage is but a copy of the original and not the original, the record will not be taxable: *Gallatin County v. Beattie*, 3 Mont. 173. Purchase money conditionally due on a conditional sale of lands in another state is not taxable to the vendor who resides in Kansas, as he still remains the owner of the land not sold, and is not to be taxed on both the land and the purchase money conditionally due: *Wilcox v. Ellis*, 14 Kan. 588; S. C., 19 Am. Rep. 107. So a note and mortgage for unpaid purchase money due on sale of lands in another state can not be taxed to the vendor who resides in this state: *Fisher v. Rush County*, 19 Kan. 414.

EXCEPTION—WHEN IN HANDS OF AGENT IN ANOTHER STATE CHOOSES IN ACTION TAXABLE AT AGENT'S RESIDENCE. Chooses in action of non-resident, when in the possession of or under the management of a managing agent of the owner resident within the state, are taxable there: *Supervisors of Tazewell County v. Davenport*, 40 Ill. 197; *Forseman v. Byrns*, 68 Ind. 247; *People v. Gardner*, 51 Barb. 352; *Redmond v. Com'rs of Rutherford*, 87 N. C. 122 (citing the principal case); *Cutlin v. Hull*, 21 Vt. 152. Mortgages and notes secured by land, held by an agent of the non-resident, are taxable at the agent's residence, and not at the owner's: *People v. Smith*, 88 N. Y. 576; *People v. Gardner*, 51 Barb. 352; *Redmond v. Rutherford County Com'rs*, 87 N. C. 122. So in case of money due for the sale of lands: *People v. Trustees of Ogdensburg*, 48 N. Y. 390, 397, 398; *contra: Lord v. Arnold*, 18 Barb. 104. Municipal bonds sent out of the state of the owner's domicile *bona fide* for safe keeping, and not to avoid taxation, cease to be taxable there: *State v. Howard County Court*, 69 Mo. 454. But if mortgages are so deposited fraudulently, for the purpose of avoiding taxation, they will still remain taxable at the owner's residence: *Poppleton v. Yamhill County*, 8 Or. 337. In *Hunter v. Supervisors of Page Co.*, 33 Iowa, 376, 379; a deposit of a note without the state for safe keeping is held not to remove it from the taxing jurisdiction. Where the deposit is merely temporary, in a bank or in the hands of an attorney for collection, it still remains taxable only at the owner's domicile: *Herron v. Keeran*, 59 Ind. 472; S. C., 26 Am. Rep. 87. When the owner and his agent are residents of the same state, the choses in action are to be assessed at the owner's residence: *Boardman v. Thompson County Supervisors*, 85 N. Y. 359.

NATIONAL BANK STOCK, WHERE TAXED.—The cases upon this point have arisen from a question as to the construction of United States revised statutes, sec. 5219, giving states power to tax the stock of national banks situated within their limits. Most of the courts have decided that under this statute this stock in the hands of residents may be taxed, at the option of the state, either at the owner's residence or at the location of the bank; but that the stock of non-residents of the state must be taxed there only: *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499; *Whitney v. Raysdale*, 33 Ind. 107; S. C., 5 Am. Rep. 185; *Austin v. Boston*, 14 Allen, 359; *Providence Inst. etc. and Jewell v. City of Boston*, 101 Mass. 575; S. C., 3 Am. Rep. 407; *Little v. Little*, 131 Mass. 367; *Howell v. Village of Cassopolis*, 35 Mich. 471; *State v. Newark*, 40 N. J. L. 558 (but see *State v. Haight*, 31 N. J. L. 399; *State v. Hart*, Id. 434); *Buie v. Com'rs of Fayetteville*, 79 N. C. 267; *Moore v. Mayor etc. of Fayetteville*, 80 Id. 154; S. C., 30 Am. Rep. 75; *Strong v. O'Donnell*, 10 Phila. 575; *Clapp v. Burlington*, 42 Vt. 579. In the absence of a statute providing for the taxation of a resident's stock at the location of the bank, such stock will be taxed at the owner's residence: *Strong v. O'Donnell*, 10 Phila. 575. A minority of authority holds that all such stock, whether belonging to residents or non-residents, can be taxed only at the

location of the bank, and that the word "place" in the statute refers to the location of the bank, not to the state authority under which the tax is to be levied: *Packard v. Lewiston*, 55 Me. 456; *First Nat. Bank of Mendota v. Smith*, 65 Ill. 44; *Baker v. First Nat. Bank*, 67 Id. 297; *Mayor of Nashville v. Thomas*, 5 Coldw. 600.

RESIDENCE AND PRINCIPAL OFFICE OF CORPORATION, WHERE.—In assessing a tax it is often of great importance to ascertain the residence of a corporation. For example, when vessels or choses in action are to be taxed, it is often necessary to determine of what state and of what town a corporation is a resident. So where the statute provides that property shall be taxed at the owner's residence, the same question arises. A corporation is a resident of the state creating it, and of the town wherein is its principal office or place of business: *Sangamon etc. R. Co. v. County of Morgan*, 14 Ill. 163; S. C., *ante*, p. 497; *International Life Assurance Society v. Commissioners*, 28 Barb. 318; *St. Louis v. Ferry Co.*, 40 Mo. 580; *Ontario Bank v. Bunnell*, 10 Wend. 186; *State v. Warford*, 37 N. J. L. 397; *Pelton v. Northern T. Co.*, 37 Ohio St. 450. The principal office or place of business of a corporation is where the governing power of the corporation is exercised and where officers are elected, not where the principal labor of the employees is carried on: *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Putman v. Fife Lake*, 45 Mich. 125; *McCoy v. Anderson*, 47 Id. 502; where the books are kept: *People v. City of Oswego*, 6 Thomp. & C. 673; and where the safe and the secretary's office are: *State v. Person*, 32 N. J. L. 134. In New York the certificate of incorporation establishes the residence of a domestic corporation. By statute this must designate a town where the principal operations of the company are to be carried on: *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 Id. 449; *Union Steamboat Co. v. Buffalo*, 82 Id. 351. A company may move its principal office to escape taxation: *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

CORPORATE PERSONAL PROPERTY, WHERE TAXED.—Although a resident of the creating state, a corporation, like a natural person, may have property located in another state, and so subject to taxation there: *St. Louis v. Ferry Co.*, 40 Mo. 580. This property so liable embraces only the property and assets of the foreign corporation which are within the taxing state: *Commonwealth v. Standard Oil Co.*, 15 Rep. 59. Upon real property, funds invested in business, or stock employed in manufacturing within the limits of the state, they may be taxed: *Blackstone Mfg. Co. v. Inhab. of B.*, 13 Gray, 488; *International Life Assurance Society v. Commissioners*, 28 Barb. 318. The privilege of carrying on its business within a foreign state is taxable by that state: *Commonwealth v. Milton*, 54 Am. Dec. 522; *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St. 105. The foreign corporation is to be taxed at its principal office or place of business within the state, under the New York statute: *British Com. Life Ins. Co. v. Commissioners*, 1 Keyes, 303; *People v. McLean*, 17 Hun, 204; *British etc. Ins. Co. v. Commissioners*, 31 N. Y. 32; *People v. McLean*, 8 Id. 254. A corporation chartered by two states is taxable on its capital stock in each: *Quincy R. R. Bridge Co. v. Adams Co.*, 88 Ill. 675. See *Michigan R. R. Co. v. Auditor General*, 9 Mich. 448. A corporation does not become a resident of a state by being authorized to build a bridge across a river dividing the state creating the corporation and the former state: *State v. Mutchler*, 42 N. J. L. 461. Shares of a resident corporation are taxable to resident holders, though the entire property of the corporation is in another state where taxes are paid thereon: *San Francisco v. Fry*, 16 Rep. 456. Company resident in England is taxable there on profits made elsewhere:

Cesena Sulphur Co. v. Nicholson, L. R., 1 Exch. Div., 428; *Calcutta Jute Mills Co. v. Nicolson*, Id.

DOMICILE OR RESIDENCE WITH RESPECT TO TAXATION.—A residence or domicile is presumed to continue until another is acquired, and there is satisfactory evidence of an abandonment of the original domicile: *Nugent v. Bates*, 51 Iowa, 77; S. C., 33 Am. Rep. 117; *Littlefield v. Brooks*, 50 Me. 475; *Bulkeley v. Williamstown*, 3 Gray, 493; *Matter of Nichols*, 54 N. Y. 62; *Hood's Estate*, 21 Pa. St. 106; *McCutchen v. Rice County*, 2 McCrary, 337. In order to change the domicile there must be an intention to change it combined with the actual fact of change: *Thorndike v. City of Boston*, 1 Met. 242; *Kirkland v. Whately*, 4 Allen, 462; *Carnoe v. Freetown*, 9 Gray, 357; *Mead v. Boxborough*, 11 Cush. 362; *Mann v. Clark*, 33 Vt. 55. A mere intention to change it without the actual fact of change or moving to another place and there establishing a residence is insufficient to change the domicile: *Stoddert v. Ward*, 31 Md. 562; *Otis v. Boston*, 12 Cush. 44; *Wright v. Boston*, 126 Mass. 161. And although a departure is made from the original residence, if it be but temporary, for purpose of business or pleasure, with an intention to return, the domicile is not lost: *Culbertson v. Floyd County*, 52 Ind. 361; *Church v. Rowell*, 49 Me. 367; *Cabot v. Boston*, 12 Cush. 52; *Cochrane v. Boston*, 4 Allen, 177; *Sears v. Boston*, 1 Met. 250; *State v. Ross*, 23 N. J. L. 517; *Moore v. Wilkins*, 10 N. H. 452; *Arnold v. Davis*, 8 R. I. 341; *Woodard v. Isham*, 43 Vt. 123. In *Briggs v. Rochester*, 16 Gray, 337, and *Colton v. Longmeadow*, 12 Allen, 598, it was held that if a person left a town with the intention of never returning, although he did not acquire a domicile elsewhere, he would not be taxable under a statute imposing a tax on the inhabitants of a town. But these cases were overruled in *Berland v. Boston*, 132 Mass. 89, 94, 99; S. C., 42 Am. Rep. 424. The words "residing" and "inhabitant" in a statute generally have the same effect as domicile: *Story's Conf. Li.*, 8th ed., 61, note; *Culbertson v. Floyd County*, 52 Ind. 361; *Lee v. Boston*, 2 Gray, 484. But see *Douglas v. Mayor etc.*, 2 Duer, 110. The act of voting in a town is strong evidence of domicile there: *Kellogg v. Oshkosh*, 14 Wis. 623; *State v. Casper*, 36 N. J. L. 367. See note on "domicile" to *Frost v. Brisbin*, 32 Am. Dec. 427. A person may be domiciled in one town though he spends most of his time in another town: *Thayer v. Boston*, 124 Mass. 132; S. C., 26 Am. Rep. 650. Residence is a question of fact for the jury: *Bailey v. Buell*, 59 Barb. 158; *Dorn v. Backer*, 61 N. Y. 261. And the burden of proof as to domicile is upon the assessor in an action of trespass against him for an illegal levy: *Halbut v. Green*, 42 Vt. 316. The owner's election to pay taxes in one town rather than in another is not conclusive of his residence in the town of his election: *Lyman v. Fiske*, 17 Pick. 231; S. C., 28 Am. Dec. 293. His consent to have his property taxed in another county does not relieve him from taxation in the county of his residence: *Blood v. Sayre*, 51 Vt. 609. On the other hand, a consent to be taxed upon a certain amount at another place than his residence does not imply an assent to be taxed upon any more: *Phelps v. Thurston*, 47 Conn. 477. A summer residence does not constitute a domicile: Id. Where a person is liable to taxation in another town than that of his residence, and his property is there taxed, he can not also be taxed at the town of his residence: *Preston v. Boston*, 12 Pick. 7; *Bats v. Weymouth*, 9 Gray, 433; *Little v. Little*, 131 Mass. 367; see *Capella v. Carradine*, 19 La. Ann. 305. But a person who has already been taxed for city and county purposes, and removes afterward into a city of the county where he has been taxed, is also assessable for city purposes on the same personal property: *Hilgenberg v. Wilson*, 55 Ind. 210.

A person may change his domicile from one town to another for the purpose of diminishing his taxes: *Draper v. Hatfield*, 124 Mass. 53; *Thayer v. Boston*, Id. 132. The furniture of a United States surgeon is taxable in a city where he is stationed on duty, without any intention on his part of acquiring a domicile there, and although such property was exempt at his domicile: *Finley v. City of Philadelphia*, 32 Pa. St. 381. A tax on property of persons residing in Great Britain applies to persons residing there for any length of time, no matter how short, and though they may be domiciled elsewhere: *Attorney General v. Coote*, 4 Price, 183. In Rhode Island personal property is taxed in the town in which the owner has resided during the greater portion of the twelve months preceding the day of assessment: *Ailman v. Griswold*, 12 R. I. 339; *Greene v. Gardiner*, 6 Id. 242.

SITUS OF PERSONAL PROPERTY WITH RESPECT TO DAY OF ASSESSMENT.—Personal property brought within the state after the statutory date is not taxable for that year: *Waugler v. Blackhawk Co.*, 56 Iowa, 384; *Oregon Steam Nav. Co. v. Portland*, 2 Or. 81. But see *Hunt v. McFadgen*, 20 Ark. 277. When, however, the owner was assessed in one town, and before the assessment of that town was completed the portion in which he resided was set off to another town, he nevertheless remained liable on the original assessment: *Harman v. New Marlborough*, 9 Cush. 525. But a removal of person or property from a state, county, or town after the assessment in that jurisdiction has been made, or after the statutory date when the assessment is to be made, will not relieve the property from that tax: *People v. Holladay*, 25 Cal. 300; *State v. Eastabrook*, 3 Nev. 173; *Warren v. Werner*, 13 Wis. 366. And although the property is afterwards assessed and taxes paid in another county, this will not discharge the former assessment: *People v. Holladay*, 25 Cal. 300. But one who has ceased to be an inhabitant at the time of the assessment is not assessable as such: *Barber v. Potter*, 8 R. I. 15. It is not the state tax roll which creates the indebtedness for a local tax, but the ordinance which levies the tax. Hence, a person who removes with his property out of the state, after the assessment of the state tax, but before the assessment of the local tax, is not indebted for the local tax: *Templeton v. Levee Commissioners*, 16 La. Ann. 132. When the property is taxed where it is located, if out of the state on the assessment day, it will not be taxable for that year: *Colbert v. Board of Supervisors*, 60 Miss. 142.

TANGIBLE CHATTELS OF NON-RESIDENT TAXABLE WHERE FOUND. As the right to tax results from the protection afforded, and has no necessary connection with personal allegiance, personal property which is capable of having an actual *situs* within a state is there taxable, although the owner reside without the state. The rule that personal property follows the domicile of its owner does not apply to the laws of taxation when the chattels have acquired an actual *situs* or are permanently located anywhere: *Irvine v. New Orleans etc. R. R. Co.*, 94 Ill. 105; S. C., 34 Am. Rep. 208; *Mills v. Thornton*, 26 Ill. 300. The personal property of non-residents is taxable at the actual *situs* of the property: *Battle v. Mobile*, 9 Ala. 234; S. C., 44 Am. Dec. 438; *Mayor v. Baldwin*, 57 Ala. 61; S. C., 29 Am. Rep. 712; *Hartland v. Church*, 47 Me. 169; *St. Louis v. Ferry Co.*, 40 Mo. 580; *Taylor v. Love*, 43 N. J. L. 142; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Frank's Appeal*, 52 Pa. St. 367; *Ahl v. Gleim*, Id. 432; *Cooley on Taxation*, 14, 15; *Witherspoon v. Duncan*, 4 Wall. 210. That assessors have no right to assess a non-resident applies only to poll taxes: *Hartland v. Church*, 47 Me. 169. Where the assessors are not authorized to seize and sell property of non-residents, they can not assess such property, for they can not assess it to the person, he being out of their

jurisdiction: *New York etc. R. R. Co. v. Lyon*, 16 Barb. 651; see *People v. Supervisors of Chenango*, 11 N. Y. 563. Whisky sold to a non-resident, but still in the hands of the vendor, is taxable as property within the state, and the possessory control held by the vendor is sufficient to authorize an assessment to him: *Commonwealth v. Gaines*, 30 Ky. 389. Partners who reside in England and buy goods there for sale by the firm in New York are not taxable on the profits made in New York: *Salley v. Attorney General*, 5 Hurlst. & N. 711.

PROPERTY OF NON-RESIDENTS OF STATE, COUNTY, OR TOWN, INVESTED AND EMPLOYED IN BUSINESS, may be taxed at actual *situs*. It is not unconstitutional, a regulation of commerce, a tax on imports or in restraint of trade, for a state to tax goods of a non-resident consigned to a consignee within the state to be sold: *People v. Coleman*, 4 Cal. 46; *Reiman v. Shepard*, 27 Ind. 288; *Brown v. Houston*, 33 La. Ann. 843; S. C., 39 Am. Rep. 284; *McCormick v. Fitch*, 14 Minn. 252; *Harrison v. Ficksbury*, 3 Smed. & M. 581. A tax upon a trade or business carried on within the state includes a tax on personal property employed in the state in private banking and for loaning money on bonds, notes, and mortgages: *McClutchen v. Rice County*, 2 McCrary, 337. But see *Little v. Greenleaf*, 7 Mass. 236. In *The Parker Mills v. Commissioners of Taxes*, 23 N. Y. 242, 245, it is held that under a statute subjecting the capital of non-residents invested within the state to taxation, property sent there merely for sale would not be taxable. Over the property of its own residents the state has full jurisdiction, subject to the provisions of the state and United States constitutions, and statutes often prevail which subject the resident's property engaged in trade or invested in business to taxation, at the place of business or actual *situs* of the property, and not at the owner's residence: *Lemp v. Hastings*, 4 G. Greene, 448; *Ament v. Humphrey*, 3 Iowa, 255; *Little v. Greenleaf*, 7 Mass. 236; *Gray v. Kettell*, 12 Mass. 161; *Worth v. Commissioners of Fayetteville*, 1 Winst. Eq. 70; *Mitchell v. Plover*, 53 Wis. 548. Machinery used in manufacture is to be taxed at the manufactory, though the articles manufactured be sold elsewhere: *Peltz v. Gaywin*, 104 Ill. 647. A person having a place of business at another town than his residence every year, but not existing there on the day of the assessment, is not taxable there under the Massachusetts statute: *Field v. City of Boston*, 10 Cush. 65. Property merely stored in another town than the principal place of business is not taxable to the firm as having a "place of business" at the town of storage: *Little v. Cambridge*, 9 Cush. 298. No tax may be levied on imports and exports, and a tax on timber being shipped and awaiting shipment is invalid: *Blount v. Monroe*, 60 Ga. 61. Property of a partnership may be taxed at the firm's place of business, though the partners reside elsewhere: *Swallow v. Thomas*, 15 Kan. 66; *Fairbanks v. Kittredge*, 24 Vt. 9; see *St. John v. Mobile*, 21 Ala. 224. Some statutes provide that a non-resident is liable for a tax on merchandise in a store, shop, or upon a wharf occupied by him. To render him liable under such a tax, his occupancy must be such as would constitute him the owner of the premises for the time being: *Desmond v. Machiasport*, 48 Me. 478; *Lee v. Templeton*, 6 Gray, 579. See also *Ellsworth v. Brown*, 53 Me. 519; *Loud v. Charlestown*, 103 Mass. 278.

PROPERTY IN TRANSITU NOT TAXABLE IN JURISDICTIONS THROUGH WHICH IT PASSES. To render taxation uniform, it is necessary that each taxing district should confine itself to the objects of taxation within its limits; but with the understanding that the *situs* of personal property may be the domicile of the owner: *People v. Townsend*, 56 Cal. 633. A tax on migratory cattle was therefore held void: *Id.* Personal property in the course of trans-

portation from one taxing district to another is not taxed in the districts through which it passes: *Ogilvie v. Crawford County*, 2 McCrary, 148; *Walton v. Westwood*, 73 Ill. 172; *Irvin v. New Orleans etc. R. R. Co.*, 94 Ill. 105; S. C., 34 Am. Rep. 208; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *Conley v. Chedic*, 7 Nev. 336; *Hurley v. Town of Texas*, 20 Wis. 634. Although delayed in a town for shipment, it is still in transit: *Ogilvie v. Crawford County*, 2 McCrary, 148; *State v. Carrington*, 39 N. J. L. 35; *State v. Eagle*, 34 Id. 425. But property is not exempted from taxation because purchased by a non-resident with an intention of removing it from the state, if it is not in actual transit but is waiting: *Currier v. Gordon*, 21 Ohio St. 605; *Commonwealth v. Gaines*, 80 Ky. 489. And where grain is stored in a warehouse under the control of an agent, or consigned to a consignee within the state for sale, it is not in transit, and is taxable in the hands of the agent: *Walton v. Westwood*, 73 Ill. 125; *McCormick v. Fitch*, 14 Minn. 252.

ROLLING STOCK OF RAILROADS, WHERE TAXED.—This peculiar property, which has furnished the topic of so much discussion, is held to be situated, in the absence of a special statute, in the town where the principal office of the corporation is; that is, at the corporate residence. Without the help of a statute, it is incapable of acquiring a permanent locality or *situs* separated from the owner's residence: *Mohawk etc. R. R. Co. v. Clute*, 4 Paige, 384; *Appeal Tax Court v. Western Md. R. R. Co.*, 50 Md. 274; *Philadelphia, Wilmington etc. R. R. Co. v. Appeal Tax Court*, Id. 397; *Appeal Tax Court v. Northern Cent. R'y Co.*, Id. 417; *Appeal Tax Court v. Pullman Palace Car Co.*, Id. 452; *Kansas City etc. R. Co. v. Severance*, 55 Mo. 378; *City of Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *Orange etc. R. R. Co. v. Alexandria*, 17 Gratt. 176. But it may be provided by statute that such property be taxed in each county at a rate proportional to the length of the road within the county: *Cook County v. Chicago etc. R. R. Co.*, 35 Ill. 460; *Kansas City etc. R. Co. v. Severance*, 55 Mo. 378; *Richmond etc. R. R. Co. v. Alamance Commissioners*, 84 N. C. 504. Under such a statute it was held that a company was not taxable in a county wherein it ran its cars over a leased track: *Cook County v. Chicago etc. R. R. Co.*, 35 Ill. 460.

TRUST PROPERTY TAXABLE AT TRUSTEE'S RESIDENCE. The legal estate in trust property being in the trustee, personal property subject to a trust must be assessed at the trustee's domicile, that being the domicile of the legal owner: *Latrobe v. Baltimore*, 19 Md. 13; *People v. Albany*, 40 N. Y. 154; *Cornwall v. Todd*, 38 Conn. 443. It is sometimes provided by statute that unless the *cestui que trust* is a non-resident, or the trust is subject to other conditions, the property shall be taxed at the residence of the *cestui que trust*: *Davis v. Macy*, 124 Mass. 193; *Green v. Mumford*, 4 R. I. 313. When, however, the property is taxable at the trustee's residence, and there are two or more trustees, and they reside in different places, the property is taxed proportionally to each at his residence: *Baltimore v. Stirling*, 29 Md. 48; *Appeal Tax Court v. Gill*, 50 Id. 377; *Hardy v. Yarmouth*, 6 Allen, 277; *Stinson v. Boston*, 125 Mass. 348. Unless by special statute the *cestui que trust* is taxable on the trust property, shares of stock held by the trustee without the state are not taxable within it: *Dorr v. Boston*, 6 Gray, 131. Of course, if the property is taxed by law at its actual *situs*, the trust relation will not render it taxable elsewhere.

GUARDIAN AND WARD.—The *situs* or domicile of the infant, and not that of the guardian, is effective in ascertaining where the property is to be taxed: *Mason v. Thurber*, 1 R. I. 481; *School Directors v. James*, 2 Watts & S. 568; S. C., 37 Am. Dec. 527. And at this place the stock and bonds held by the

guardian for the infant's benefit will be taxed: *Louisville v. Sherley etc.*, 80 Ky. 71. The personal property may be made taxable at the guardian's residence by statute: *Tousey v. Bell*, 23 Ind. 423, 427; *Baldwin v. First Parish*, 5 Pick. 494.

PROPERTY OF DECEDENT, WHERE TAXED.—On the question whether the domicile of the executor or the last domicile of the decedent is to govern in the assessment of taxes on the decedent's personal property yet undistributed, the cases conflict. Some hold that even though a trustee is taxable on the trust property at his residence, an executor or administrator is not a trustee, and therefore the property till distributed is to be taxed with respect to the last residence of the deceased: *Cornwall v. Todd*, 38 Conn. 443; *Stephens v. Booneville*, 34 Mo. 323. In Massachusetts a statute prevails to this effect: *Hardy v. Yarmouth*, 6 Allen, 277. In Iowa a statute provides that the personal property of the decedent shall be listed for taxation by the executor, and the court held that it must at all events be assessed in the county where the decedent died, and then in the township of the administrator's or executor's residence: *Cameron v. Burlington*, 56 Iowa, 320. But the courts of many states hold, or the states provide by statute, that the personalty of the decedent be taxed at the executor's residence, and in that case, stocks, bonds, and choses in action will be taxed there: *State v. Collector of Holmdel*, 39 N. J. L. 79; *Johnson v. Oregon City*, 3 Or. 13; *Mayor etc. of Gallatin v. Alexander*, 10 Lea, 475. Bonds transmitted to an administrator in another state for the purpose of ancillary administration are taxable there: *St. Louis County v. Taylor's Adm'r*, 47 Mo. 594. Under the Massachusetts statutes, if the executor resides without the state, the personal property of an inhabitant can not be taxed there: *Dallinger v. Rapello*, 14 Fed. Rep. 32; S. C., 15 Id. 434. An assessment should not be made to an executor having none of the personal property of the decedent in his possession: *People v. N. Y. Com'r*, 17 Hun, 293. As in the case of trustees, when the executors reside in different places, they are each taxed proportionally at their respective residences: *State v. Matthews*, 10 Ohio St. 431; but see *Johnson v. Oregon City*, 3 Or. 13. When a mortgage is not personal property, it will not be assessable to the executors, but to the devisees: *State v. Leggett*, 40 N. J. L. 308.

PROPERTY SUBJECT TO COLLATERAL INHERITANCE TAX.—The taxation of collateral inheritances is within the power of the legislature. A protection is afforded, and the state may tax the legatee's right of succession: *Eyre v. Jacob*, 14 Gratt. 422, 430. But the tax will be payable only upon that part of the decedent's property situated within the taxing jurisdiction. If the decedent was domiciled abroad, and his personal property was abroad, although the legatee be within the state, he will not be subject to the collateral inheritance tax: *State v. Brim*, 4 Jones Eq. 300; *Commonwealth v. Dufield*, 12 Pa. St. 277; even though the testator die within the taxing jurisdiction, and the property be brought within it and administered there: *Attorney General v. Forbes*, 2 Cl. & Fin. 48; *Attorney General v. Dimond*, 1 Crompt. & J. 356, 370; *Attorney General v. Hope*, 8 Bli. N. S. 44. But although the testator be domiciled elsewhere, upon the property within the state the collateral inheritance tax falls: *Albany v. Powell*, 2 Jones Eq. 51; *Commonwealth v. Smith*, 5 Pa. St. 142. The principle of taxation with respect to bonds, stock, and choses in action, as set forth above, applies as well to collateral inheritance taxation. Thus foreign stocks and bonds are subject to this tax when held by a resident testator: *In re Eddin*, 1 Crompt. & J. 150, 155; *In re Cigala Settlement*, L. R., 7 Ch. Div., 356; *Attorney General v. Bouwens*, 4 Mee. & W. 171, 190; *Short's Estate*, 16 Pa. St. 63. On the other hand, such property belonging to a non-resident

testator is not so subject, though the debt evidenced thereby be situated within the state: *Commonwealth's Appeal*, 14 Rep. 183; *Thompson v. Advocate General*, 12 Cl. & Fin. 17, 20. The legacy duty imposed by the act of congress, June 30, 1864, c. 255, secs. 124, 125, is confined to the estates of persons whose domicile at the time of their death is within the United States: *United States v. Hunnewell*, 13 Fed. Rep. 617; and see note to this case, page 620, upon "legacy duty."

MISCELLANEOUS CASES—SLAVES, CATTLE.—Slaves were taxed at the owner's residence: *Green v. Allen*, Busb. L. 228; *Brown v. Greer*, 3 Head, 695; even though temporarily absent from the state: *Commonwealth v. Hayes*, 8 B. Mon. 1. But see *City Council v. State*, 2 Spears, 719. Cattle are generally taxed where they run or graze, though the owner be elsewhere: *State v. Falkenburg*, 15 N. J. L. 320. If they run in two counties, he is taxable on the number running in each: *Price v. Kramer*, 4 Col. 546. A statute taxing all personal property in the state on the first of January covers cattle of a non-resident which were within the state for five months, including the first of January: *Hardesty v. Fleming*, 57 Tex. 395. It is unconstitutional to tax migratory cattle: *People v. Townsend*, 56 Cal. 633.

Carriage, horses, and driver (slave) used by a non-resident of a city in going to and from his business, and kept without the city limits, are not taxable as property within the city: *City Council v. State*, 2 Spears, 719.

The legislature, in setting off one town to another, may provide that the part so set off shall pay its proportion of certain debts of the town from which it is separated; and for the purposes of such an assessment it is to be considered as a part of the original town: *Winslow v. Morrill*, 47 Me. 411.

A provision for separate assessments in each civil district, by the district assessors, does not prevent the county judge, or other officer required to assess the omitted property, from assessing in gross the property of the same tax-payer extending through several districts: *Louisville & Nashville R'y Co. v. State*, 8 Heisk. 663.

THE PRINCIPAL CASE IS CITED in *Bank v. City of Albany*, 11 Ind. 143, to the point that, by statute, the methods of taxation by *situs* are different from that of the state, the latter being allowed to tax only property within their limits.

ROGERS v. EVANS.

[3 INDIANA, 574.]

CONVEYANCE OF LAND BY DEFENDANT PENDING ACTION, executed with the collusion of the grantee, to prevent the collection of any judgment in that action, will be set aside, although the grantee paid full consideration.

PURCHASER FROM FRAUDULENT GRANTOR, TO MAKE DEED VALID against the grantor's creditors, must show not only payment of an adequate consideration, but also good faith in the purchase, and no notice of vendor's fraudulent designs.

ERROR to the Decatur circuit court. The opinion states the case.

J. S. Scobey, for the plaintiff in error.

A. Davidson, for the defendant in error.

By Court, ROACHE, J. This was a bill in chancery, filed in the Decatur circuit court by William Evans, the complainant below, against Thomas J. Rogers, John Rogers, and Robert McCleary.

The material allegations in the bill are, that Evans, on the tenth of May, 1842, commenced an action of slander, in the Decatur circuit court, against John Rogers, and on the twelfth of November, 1842, recovered a judgment for eight hundred and fifty dollars and costs; that during the pendency of that suit, and only a short time before the rendition of the judgment, to wit, on the thirteenth of October, 1842, said John conveyed his land, situated in Decatur county, to his brother, Thomas J. Rogers, who lived in Boone county, for the purpose of defrauding the complainant and preventing him from subjecting said land to the payment of any judgment he might obtain in the slander suit; and that Thomas J. accepted the deed for the purpose of assisting his brother in perpetrating his contemplated fraud, with a full knowledge of the pendency of the slander suit.

The bill further alleges that the defendant McCleary purchased the land from the said Thomas J. during the pendency of this suit, with a full knowledge of all the foregoing facts, and of the fraudulent designs of both the other parties; that the said John had no other property of any description out of which said complainant's judgment could be made.

The prayer of the bill is, that the conveyances should be set aside as fraudulent and void, as against the complainant, and that the land should be subjected to execution on his judgment. The bill was taken as confessed as to McCleary. The defendants John and Thomas J. Rogers filed answers under oath.

The answer of John admits the pendency of the slander suit, the judgment therein, his ownership of the land, and his conveyance to his brother Thomas J., as stated in the bill, and that he has no other property; but denies the charges of fraud; avers that at the time of the sale to his brother he had no apprehension that Evans would recover any judgment against him; and insists that the sale was made by him in good faith; that the price for which he sold the land, seven hundred dollars, was its full value; that his brother gave him two notes for three hundred and fifty dollars each, the one due in two, the other in five, years from date, on the first of which he entered a credit at the time of fifty dollars, which he owed his brother.

The answer of Thomas J. Rogers denies all knowledge of the

pendency of the slander suit at the time of his purchase of the land, and alleges that he gave full value, etc., in the manner and on the terms mentioned in the answer of John Rogers, and avers he acted in good faith, without fraud, etc.

The cause came to a hearing on the bill, answers, default of McCleary, exhibits, and depositions, and a decree was rendered in the court below, in accordance with the prayer of the bill, setting aside the conveyances, and subjecting the land to execution.

There is no question of law involved in this case which has not been settled by repeated adjudications in this court. The depositions are very full and explicit, and abundantly sustain all the material allegations of the bill. They clearly establish that John Rogers executed the conveyance to his brother for the purpose of placing the land beyond the reach of any judgment Evans should recover in the slander suit. It is equally clear that Thomas J. Rogers was well aware of the pendency of that suit at the time of his purchase, and participated with his brother John in his fraudulent purpose.

The counsel of the appellants insist that the fact that Thomas J. agreed to pay the full value of the land rebuts the charge of fraud on his part. There is no satisfactory evidence of the payment of the consideration alleged to have been agreed on. But this is immaterial. Even if he had shown that he had actually paid a fair price for the land, in cash, it would not avail him. For his knowledge of the object of his brother in making the deed, and his participation in the fraudulent intent, render his purchase voidable at the suit of a creditor. To make the deed of a fraudulent grantor valid in the hands of the purchaser, as against the creditors of the grantor, it is not enough for him to show that he has paid an adequate consideration; but he must show, in addition, that he made the purchase in good faith, innocent of any knowledge of or participation in the fraudulent designs of the vendor: *Wright v. Brandis*, 1 Ind. 336; *Basye v. Daniel*, Id. 378; *Sands v. Hildreth*, 14 Johns. 493.

The decree is affirmed, with costs.

DAVIDSON, J., being counsel for the defendant, took no part in the decision.

CONVEYANCE TO AVOID PAYMENT OF ANTICIPATED JUDGMENT IS FRAUDULENT: See *Greer v. Wright*, 53 Am. Dec. 111, and extensive note 113-119. The principal case is cited in *Bishop v. Redmond*, 83 Ind. 159, and *Pennington v. Clifton*, 11 Id. 164, to the effect that the word "creditor," with respect

to fraudulent conveyances, means more than the holder of a debt. It means one having a legal right to damages capable of enforcement by judicial proceedings.

FULL CONSIDERATION PAID FOR FRAUDULENT CONVEYANCE NOT SUFFICIENT TO VALIDATE DEED UNLESS ACCOMPANIED WITH GOOD FAITH ON PART OF VENDEE: See *Merry v. Bostwick*, 54 Am. Dec. 434, and cases cited in the note; *Lowry v. Pinson*, 23 Id. 140; *Anderson v. Roberts*, 9 Id. 235; *Garland v. Rives*, 15 Id. 756; but see *Worland v. Kimberlin*, 44 Id. 785. The principal case is cited to this point in *Ruffing v. Tilton*, 12 Ind. 264; *Maiselman v. Kent*, 33 Id. 458; *Lowry v. Howard*, 35 Id. 172. In *Chisson v. Lamcool*, 9 Ind. 532, the defendant excepted to instructions which did not require knowledge of the fraud in the plaintiff, who was the purchaser, and it was held that the defendant, who was seeking to avoid the conveyance on the ground of fraud, could not complain of such instructions, which were, if at all erroneous, against the plaintiff and in his own favor. In *Shean v. Shay*, 42 Id. 377, the court, in commenting upon the principal case, said, that although in many cases the fraudulent deed is found to have been made after the commencement of the action the pendency of the action creates no lien, and a deed made for a valuable consideration and in good faith may be valid under such circumstances. Payment of full consideration furnishes a presumption of good faith: *Brown v. Force*, 46 Am. Dec. 519.

CASES
IN THE
SUPREME COURT
OF
IOWA.

CAVENDER *v.* SMITH.

[3 G. GREENE, 349.]

CERTIFICATE OF PURCHASE FROM UNITED STATES LAND OFFICE, ISSUED PRIOR TO PATENT, conveys the absolute title, and a patent subsequently acquired relates back to the date of said certificate.

ONE WHOSE LANDS, HELD UNDER CERTIFICATE OF PURCHASE, but for which the patent has not been issued, are sold under execution, can not set up the subsequently acquired patent to defeat an action brought for the possession thereof.

ERROR to Des Moines district court. The opinions states the facts.

Starr and Hall, for the plaintiff in error.

Rorer and Browning, for the defendant in error.

By Court, GREENE, J. An action of right by John Cavender against Jeremiah Smith for the west half of the south-east quarter of section six, in township sixty-nine north, range two west.

The plaintiff gave in evidence the duplicate of the register of the Fairfield land office, which certified that the land was purchased from the government of the United States, January 16, 1840, by Jeremiah Smith. He also introduced to the jury a judgment of the district court of Des Moines county, rendered on the seventeenth of February, 1840, for the sum of two hundred and thirty-four dollars, in favor of Smith Brothers & Co., against said Smith. He then read in evidence an execution issued on said judgment, with the levy and return; and

also a deed from Cameron, sheriff, dated June 13, 1841, conveying the land in question to James W. Grimes, by virtue of said execution; also a deed dated October 28, 1843, from J. H. McKinney, the then acting sheriff of said county, which was executed by virtue of the same execution to said Grimes; and also a deed from said Grimes to the plaintiff, dated May 31, 1843. He also gave evidence to show that Smith was in possession of the land at the commencement of the suit.

It appears that the defendant then offered in evidence, by way of defense, and to show title in himself, acquired since the judicial sale of the premises, a patent from the United States for the land in controversy. The patent is dated December 1, 1841. To the introduction of the patent for that purpose the plaintiff objected, but the court permitted it to go to the jury as evidence, and instructed the jury that the patent shows the legal title to the land in question was in the defendant at the commencement of the suit; and that the legal title must prevail over all others in this action. Thereupon the jury returned a verdict for the defendant.

In admitting the patent for the purpose specified, and in giving the instruction to the jury, it is contended that the court below erred. In deciding this case, it may be well to inquire what rights were acquired by the execution purchaser under the judgment and sheriff's sale. He could acquire no greater right than was vested in the judgment debtor. Before judgment was rendered against him, Smith had purchased the land from the United States, and had obtained the usual receipt or certificate of purchase. By this purchase he acquired all the property which the United States had in the land. There was no reservation made. The sale was unconditional; the right acquired was absolute. All the equity, and in fact the legal title, passed from the government to the purchaser. The government retained only the formal, the merely technical, legal title in trust for the purchaser until the patent issued. This view is fully sustained in *Carroll v. Safford*, 3 How. 441, 460. In that case the court held that "where the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate

holder and the patentee." This decision also holds that the land so purchased is, before the patent issues, real estate in the hands of the purchaser; that it descends to his heirs, and does not go to his executors or administrators; that "in every legal and equitable aspect it is considered as belonging to the realty;" and that such lands may be taxed as real estate, "as lands owned by non-residents." The opinion distinctly declares that lands which have been sold by the United States can in no sense be called their property. So far as the property and the rights of the purchaser are concerned, they are as fully protected under the certificate as they can be under the patent. Having once sold the land by certificate to one, the officers of government could not sell it again and convey a good title to another, even by patent. In reality, the purchaser was vested with the entire ownership by his certificate, and therefore the patent could not invest him with any additional property in the land; it only gave him better legal evidence of the title which he first acquired by certificate. When he paid the purchase money to the receiver of the land office he had performed on his part all that was required by the conditions of sale to perfect his purchase, and he at once acquired all but the mere evidence of a technical legal title, which was retained by the United States in trust for him till the patent could be issued. The purchaser could sell and convey the land as completely before he obtained the patent as he could after. And such was the right of Jeremiah Smith to the land in question, at the time of the sale under the judgment execution and sheriff's deed. The entire subsisting interest of Smith passed by that sale to Grimes as completely as if the transfer had been by voluntary conveyance.

But it is contended that the legal title subsequently acquired by Smith, when he obtained the patent from the United States, did not inure to the purchaser as it would have done if the conveyance had been voluntary. We have already noticed that Smith's right to the land, in substance and in fact, resulted from his purchase, and not from the patent which was subsequently issued, and that the patent was only legal evidence of that right. It follows, therefore, that the patent could not be in conflict with the right, but rather contributed to its support and confirmation. Smith's property in the land and his right to the patent, as evidence of that property, were simultaneously acquired by the same purchase. The consideration money which secured the certificate gave him, at the same time, a right to the

patent. As emanations from the same source, the relation between them can not be legitimately severed. They come from the same purchase, they convey the same property, contribute to the same object, and the one must relate back and perform the other. In what respect, then, can they be regarded as antagonistic? The fact that the patent bears date long subsequent to the certificate of sale is no evidence of a subsequent purchase. On the contrary, it purports to have issued by virtue of the prior sale, payment, and register's certificate. There could have been no subsequent purchase from the government after a valid sale, and consequently no subsequently acquired property, nor even a subsequent evidence of legal title, but such as related back to the regular purchase, and must inure to the grantee under the sheriff's deed.

If a patent issued to the execution defendant subsequent to the sheriff's sale could be set up as evidence of subsequently acquired title in such defendant, for the purpose of defeating the sheriff's deed, it is obvious that title could not be acquired by judicial sale of lands held by a land-office certificate, and thus the statute authorizing the sale of such lands would be defeated, and execution purchasers deprived of their rights. The execution law, under which the land in question was sold, expressly declared that lands under a certificate from any land office should be subject to execution: Laws of 1858-9, p. 197. It was argued, and will not be disputed, that a patent is paramount to a register's certificate, and a better evidence of legal title in the patentee. But this rule has no bearing upon the present case. There is no conflict between the two; they establish the same title. And under the statute of 1842, p. 38, the usual duplicate receipt of the receiver, or the certificate of the register of the proper land office, is made sufficient *prima facie* evidence of title, or of right of possession in actions of trespass, actions of right, or other actions at law or equity, and such a receipt or certificate is declared to have the same effect in establishing a possession at law as is given to a deed of conveyance or patent. Under this statute a receipt or certificate is made evidence of title in an action at law, and in establishing a possession it has the same effect as a patent. Thus additional importance is given to land-office receipts and certificates as evidence of legal title, in which they have the same effect as a patent, and virtually vest the conclusive legal title in the purchaser from the date of the certificate.

But, independent of this statute, the admission of the patent

for the purpose specified, and the instructions given in relation to it, were manifestly erroneous upon the doctrine of relation, which is clearly applicable to the case. This must appear incontestable under the rule in 5 Cruise on Real Prop. 510, 511, "that all the parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." This "substantial part" is recognized in Vin. Abr., tit. Relation, 291, as "the original act" which is to be preferred, and to this all subsequent acts are to have relation. This doctrine of relation appears to have been often applied to the adjudication of real actions by American courts.

In *Johnson v. Stagg*, 2 Johns. 510, a lease for nineteen years and nine months, executed August 1, 1795, pursuant to a prior parol agreement for a lease of twenty years, was considered as relating back to May 1st, so as to make valid a mortgage executed by the lessee on the sixth of May, 1795. The opinion in the case by Kent, C. J., declares that a conveyance will in many cases be deemed to relate back to the time when the agreement for it was concluded, and render valid any intermediate disposition of the land.

In *Jackson v. Dickenson*, 15 Johns. 309 [8 Am. Dec. 236], the land of A. was sold under an execution at the suit of B. on the first of March, and on the tenth a mortgagee of the land filed a bill of foreclosure against A. and B., and on the nineteenth a sheriff's deed was executed to the purchaser; and it was held that the subsequent delivery of the deed was mere matter of form, and must have relation back to the time of sheriff's sale; and that the purchaser's title was acquired before the bill was filed, and that he might contest the validity of the mortgage in an action of ejectment.

A grant by the proprietary of Maryland of escheat land relates back to the original grant, and where such grant covered lands in which he had a reversionary interest, it will operate to pass such interest: *Howard v. Moale*, 2 Har. & J. 249.

It was held in *Jackson v. Ramsay*, 3 Cow. 75 [15 Am. Dec. 242], that a deed given by a sheriff upon a previous sale or execution relates back to, and in judgment of law is executed at, the time of sale.

This doctrine was also recognized in *Jackson v. Bull*, 1 Johns. Cas. 81; *Case v. De Goes*, 3 Cai. 262; *Jackson v. Bard*, 4 Johns. 234 [4 Am. Dec. 267]; *Heath v. Ross*, 12 Id. 140. The same rule prevailed in *Rogers v. Brent*, 5 Gilm. 573 [50 Am. Dec. 422]. In

that case the judgment was recovered against A. while he held land under his certificate of entry from the United States. The land was sold on execution. After the sale, and before the time of redemption expired, A. assigned his certificate of entry to B., who obtained a patent from the United States, and then conveyed the land to C. In ejectment brought by C. it was held that the sheriff's deed related back to the judgment, and made a complete transfer of A.'s title; that the assignment from A. to B. only passed the right of redemption, and as this right was not exercised, the assignment to B. was void, and the patent issued upon it fraudulent, and conveyed no title to the patentee against the claimant under the sheriff's deed.

The same principle has been repeatedly enforced in the supreme court of the United States, and carried to a much greater extent than is necessary in the adjudication of the present case. In *Stoddard v. Chambers*, 2 How. 316, a concession was made to B. in 1800; in 1804 B. quitclaimed to M., and in 1805 M. quitclaimed to S. The claim was filed with the board of commissioners in 1808, and confirmed to B. and his legal representatives in 1836. It was held that the legal title was vested in B., and inured by way of estoppel to his grantee and those who claimed by deed under him. And in *Bissel v. Penrose*, 8 Id. 317, the same principle was maintained.

But the case of *Landes v. Brant*, 10 How. 348, broadly asserts the doctrine of relation, and clearly settles every point raised in the case at bar. In that case a Spanish claim of land was acquired by Clamorgan under Dodier, the original claimant, by virtue of ten consecutive years' possession prior to December 20, 1803. Such claim was authorized by act of congress. Clamorgan was entitled to a patent by virtue of a certificate of confirmation made by commissioners November 13, 1811. His petition for such confirmation was filed in December, 1805. In 1808 judgment was recovered against Clamorgan, the claim was sold, and a sheriff's deed executed to McNair. It was held that the execution sale passed to the purchaser all the title that could have passed from C. to M. by a quitclaim deed; that "applying the doctrine of relation and taking all the parts and ceremonies necessary to complete the title together as one act, then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805. On this assumption, intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title and pass that title

to the alienee. And on this ground the deed made by the sheriff to McNair is valid."

Under these views and authorities, we think no doubt can be entertained that the court below erred in admitting the patent and in giving the instructions, as set forth in the statement of this case, to defeat the sheriff's deed.

Judgment reversed.

"GOVERNMENT PATENT WILL RELATE TO ORIGINAL CERTIFICATE of purchase, and will be held to take effect from that date, where such a construction is necessary to sustain a sale made by the grantee, or an execution sale of his interest in the land:" Note to *Jackson v. Ramsay*, 15 Am. Dec. 254. In this note the doctrine of relation is exhaustively treated.

PIGGOTT v. ADDICKS.

[3 G. GREENE, 427.]

PETITION IN EQUITY TO HAVE JUDGMENT SET ASIDE FOR LACK OF NOTICE TO DEFENDANT, and the unauthorized appearance of an attorney for him, must state that the sum for which the judgment was rendered was not due to the plaintiff, or that it operated oppressively to defendant, and that he had a good defense at law.

PETITION IN EQUITY TO HAVE JUDGMENT AT LAW SET ASIDE MUST SHOW that the petitioner has resorted to his legal remedy; viz., a motion to set aside the judgment in the court in which it was rendered.

APPEARANCE OF COUNSEL IS PRIMA FACIE EVIDENCE OF HIS AUTHORITY to so appear.

ATTORNEY WHO APPEARS WITHOUT AUTHORITY IS LIABLE in damages to the party for whom he appears.

APPEAL from Lee district court. The opinion states the facts.

Dixon, for the appellant.

Love and Rankin, for the appellee.

By Court, KINNEY, J. A judgment having been rendered in the court below in favor of Addicks, Van Dusen, and Smith, against Piggott in attachment proceeding, he filed a petition in chancery to set it aside, stating, among other things, that no service, actual or constructive, was ever made upon him; that one William McLennin, a practicing attorney of the court, appeared without any authority and filed a demurrer, which was the only appearance in the case on the part of the defendant. The petitioner also charges that the appearance of McLennin was at the especial instance and request of the attorneys for the

plaintiff, they well knowing that one Thomas W. Claggett was the attorney for the defendant in the said attachment proceeding.

The petition was demurred to, and the following causes, among others, specially assigned: "The petition does not state that the sum of money for which the judgment was rendered was not due to the plaintiffs, or that the judgment operated oppressively upon the defendant, or that he had any defense at law. The petition does not allege that the party resorted to his legal remedy, viz., a motion to set aside the judgment, and the petitioner has, and had, such remedy and can avail himself of it."

The demurrer was sustained, and, as we think, correctly. Either of the causes of demurrer is fatal to the bill. Before the plaintiff should be permitted to set aside the judgment, it was incumbent upon him to state in his petition that it was unjust, and that he did not owe the amount for which judgment was rendered. There is no propriety in setting aside a judgment and opening the door for further litigation, if the result is to be the same. Such a proceeding would only delay the creditor in the collection of an honest debt, and be of no possible advantage to the debtor.

If it had appeared by the showing of the plaintiff that he had a meritorious defense to the claim, or any part of it, and that he had been deprived of making such defense by the unauthorized appearance of an attorney, then, upon a proper application, the court should have opened the judgment for the purpose of permitting such defense. But there is no pretense of defense, or that the judgment is not just, or that it could in any manner be reduced upon a second trial. The door of equity is only open to such as have been or may be injured, and before chancery will take jurisdiction the injury sustained or apprehended should be clearly set forth in the petition. The appearance of McLennin as counsel is *prima facie* evidence that he had authority from the defendant to do so, and before his act as counsel could be avoided it was necessary to show in the petition that an injury resulted from such appearance. This doctrine is well and ably settled in the case of *Denton v. Noyes*, 6 Johns. 296 [5 Am. Dec. 237].

But the petitioner having a plain and adequate remedy at law, he can not resort to chancery.

1. He has a remedy against the attorney, and from aught that appears, he is able to respond to all damages which the plaintiff has sustained in consequence of an improper appearance. If

from insolvency, or other cause, an adequate redress could not be obtained by proceeding against the attorney, and if there is no other legal remedy, then a court of equity, if the party has been injured, will afford relief. But as the court below has control of its own records, the party had a right, within any reasonable time, while the judgment remained unexecuted, and while there were no intervening rights, to appear, and on a proper showing, have the judgment set aside.

Judgment affirmed.

GENERAL RULE IS, THAT EQUITY WILL NOT RELIEVE AGAINST JUDGMENT at law, unless defendant can show he had a good defense, of which he was entirely ignorant, or unless he was prevented from availing himself of his defense by fraud or accident or the act of the adverse party, unmixed with negligence or fault on his part: *Bellamy v. Woodson*, 48 Am. Dec. 221; *Stroup v. Sullivan*, 46 Id. 389, and notes. See also *Casey v. Gregory*, post, p. 581.

JUDGMENT WHICH CAN BE SET ASIDE AS VOID in a court of law, equity will not relieve against: *Armsworthy v. Cheshire*, 24 Am. Dec. 273.

MERE APPEARANCE OF ATTORNEY IS PRESUMPTIVE EVIDENCE OF HIS AUTHORITY to so appear: Note to *McAlexander v. Wright*, 16 Am. Dec. 98. See also *Smallwood v. Norton*, 37 Id. 39.

LIABILITY OF ATTORNEY FOR UNAUTHORIZED APPEARANCE. See *Denton v. Noyes*, 5 Am. Dec. 237, and note.

SPROTT v. REID.

[3 G. GREENE, 489.]

EXECUTION MUST PURSUE AND BE WARRANTED BY JUDGMENT as a general rule, but misstating the date of the judgment in the execution, if it describes and identifies it so as to render certain the authority upon which it issued, is sufficient to invest the sheriff with authority to sell, and in a collateral proceeding will sustain a sale.

JUDGMENT FOR COSTS IN PARTITION PROCEEDING is a valid and subsisting judgment, and will support an execution sale. That the parties had sixty days within which to pay said costs before execution issued, does not make the judgment conditional.

DEATH OF DEFENDANT IN EXECUTION BEFORE SALE, where the judgment was *in rem* and a lien upon the property sold, does not affect the validity of the sale.

JUDGMENT IS NOT SUCH CONTRACT AS IS CONTEMPLATED BY UNITED STATES CONSTITUTION in that clause which provides that no law shall be passed impairing the obligation of contracts. Consequently, where a judgment is rendered prior to the passage of the valuation law, and the execution is taken out under this law, it must be followed or the sale is void.

LAW REQUIRING SHERIFF TO SELL PROPERTY at not less than two thirds its appraised value is mandatory.

ERROR to Lee district court. The opinion states the facts.

Dixon, for the plaintiff in error.

Reid, *contra*.

By Court, GREENE, J. Action commenced by H. T. Reid against James Sprott for eighty acres of land on the Half-breed Tract, in Lee county. Judgment for the plaintiff. On the trial the plaintiff gave in evidence the record of the judgment of partition, and a sheriff's deed showing that the land in question had been sold to him in part satisfaction of the judgment for costs in the partition suit.

The defendant then offered in evidence two executions, issued on said judgment for costs. The *alias* execution was dated June 20, 1844, and directed the sheriff to proceed without regard to the valuation law. This execution recited the judgment as rendered April 7, 1841, when, in fact, it was rendered at the October term of the court in that year. He then offered to prove that the execution defendant died before sale to plaintiff, and the court sustained plaintiff's objection to the introduction of such proof.

To show his own right to the land, the defendant offered a deed under an administrator's sale by an order of court, dated January 8, 1845, which deed was recorded subsequently to that introduced by the plaintiff. But the defendant's deed was objected to. The court sustained the objection, and instructed the jury that the evidence introduced by the plaintiff showed the legal title to be in him.

As several errors are assigned, upon points which have already been fully adjudicated by this court, we will present those only which indicate new features for consideration.

1. It is claimed that the executions introduced by the defendant show that the plaintiff did not acquire legal title under the sheriff's deed. The variance between the date of the judgment and the date as recited in the execution is urged as sufficient to invalidate the sale. It is true, as a general rule, that the execution must pursue and be warranted by the judgment. But the variance complained of in this instance is one that might have been amended. It is one of those irregularities which should be regarded as voidable only, and we consider it not enough to invalidate the sale in a collateral proceeding like the present. The execution so describes and identifies the judgment as to render certain the authority upon which it issued, and that was sufficient to invest the sheriff with power to sell. As the vari-

ance is the result of a mistake in the clerk, which might have been amended, and as the execution otherwise identifies the judgment, it can not, under the prevailing current of authorities, be regarded as fatal to plaintiff's title: *Humphry v. Beeson*, 1 G. Greene, 199 [48 Am. Dec. 370]; *Jackson v. Page*, 4 Wend. 585; *Swan v. Saddlemire*, 8 Id. 676; *Jackson v. Streeter*, 5 Cow. 529; *Doe v. Rue*, 4 Blackf. 263 [29 Am. Dec. 368]; *Doe v. Gildart*, 4 How. (Miss.) 267.

If an execution varies or departs so materially from the judgment upon which it issued as to render the identity or connection uncertain or doubtful, there would be obvious propriety in regarding a sale under that execution void. In the case at bar, there is no such material variance, and hence the sale is not void on that account.

2. It is objected that the judgment for costs, under which the property was sold, was not such a valid operative judgment as would authorize the execution and sale, but as it is conceded that the jurisdiction of the court was competent to render the judgment of partition, it must be conceded that the powers of the court were equally competent to render the judgment for costs. The latter became a necessary incident to the former, and was expressly authorized by the partition law.

It is urged as an objection to this judgment for costs, that the law and judgment itself required payment of costs in the first instance by complainant, and that the judgment does not show such payment. The law provides that "all the costs of partition shall be paid in the first instance by the petitioners, but eventually by all the parties, in proportion to their interests." R. S. 462, sec. 32. It was not necessary for the judgment to show that the petitioners first paid the costs. It is enough for us to know that the judgment was against those who were eventually to pay the cost in proportion to their respective interests.

As the judgment was authorized by law, it must be presumed that all necessary facts, preliminary to the judgment, were established to the satisfaction of the court.

But if true that the petitioners did not in the first instance pay the cost, that fact would not exempt the parties from eventual payment, nor divest the court of power to render judgment against them, nor exempt their property from its effects.

Again, it is urged that the judgment was interlocutory and conditional, and authorities are cited showing that such judgments are objectionable. We can see no analogy between those

authorities and the judgment under consideration. This was the final judgment in confirmation of the partition. It was rendered by a court of competent authority, and awarded an execution against such of the parties as should fail to pay the costs within sixty days. The judgment, then, was not interlocutory or conditional. It was final and absolute. It unconditionally required payment of costs, and unconditionally awarded an execution against those who did not pay their respective portions within sixty days—thus virtually granting a stay of execution for that time. It will hardly be contended that a mere stay of execution makes a payment conditional. We conclude, then, that there is a valid and subsisting judgment.

3. Did the court err in rejecting the proof that the defendant in execution died before the sale? We think not. The judgment for cost was made a special lien upon the property divided. It was a judgment *in rem*, and the land in question was subject to the payment of the lien, whether the defendant was dead or alive. Besides, under the laws of this state, land is subject to the payment of debts before it can descend to the heirs at law.

But in any view of the law, the fact which the defendant below proposed to prove could not invalidate the sale. He did not propose to show that the defendant was dead at the issuing and attestation of the writ. The proof applied merely to the date of sale, and of course could have no application to the time when the execution issued, nor to the authority exercised by the sheriff under the writ: *Doe v. Heath*, 7 Blackf. 156; *Erwin v. Dundas*, 4 How. 80; *Bleecker v. Bond*, 4 Wash. 6.

We conclude, then, that the court was justified in rejecting the proof, because it could not affect the validity of the sale.

4. As the valuation law was in force at the date of the execution, and as under that law the sheriff was only authorized to sell property at two thirds its appraised value, it is claimed that the sale, having been made without regard to that law, was unauthorized and void.

The record shows affirmatively that the property was not sold under the valuation law; and the question arises, Was the judgment under which the sale was made in any way removed from the provisions of that law? If not, the sheriff had no authority to sell the land for less than two thirds its appraised value; and as the record shows that he sold it at a mere nominal price, without regard to value or valuation, the deed must be regarded as absolutely void. The only question to be decided in order to determine the application of the valuation law to the execu-

tion is, Was the judgment obtained on a contract made prior to the twentieth of February, 1843? Laws of Special Session, 1844, p. 7. This law was passed in order to make the valuation law conform to the constitution of the United States, by not "impairing the obligation of contracts."

If the judgment for cost was a contract such as the constitution contemplates, a sale according to valuation was not necessary.

According to 1 Bouv. Law Dict. 353, sec. 9, "a judgment is an express contract of the highest obligation." See also Story on Cont. 1, 2; *Dash v. Van Kleeck*, 7 Johns. 488 [5 Am. Dec. 291].

The authorities are conflicting. Lord Mansfield says that "a judgment is not a contract." In *Pease v. Howard*, 14 Johns. 479, the court say that a judgment is not a contract in fact.

But it matters not how courts may have viewed the analogy between judgments and contracts. It is obvious that a judgment is not in fact a contract; it is not an agreement or covenant between two or more persons; it is not a mutual promise upon lawful consideration, creating mutual obligations, either executed or executory; it is not an agreement between two or more to do or not to do a particular thing. A judgment may be the result of a contract, but is not the contract itself.

A judgment or decree by consent comes nearer to a contract than any other; but even such is only the result of an antecedent contract, liability, or penalty. Where a contract is enforced by judgment, it enters into and becomes a part of the judgment, but still that judgment is not the obligation of the contract, but is the authorized power under which those antecedent obligations are to be enforced.

True, the relation between a contract and its consequent judgment is very intimate, and still judgments are often rendered where no contract existed. Judgments are rendered for crimes, misdemeanors, and torts, and on mere *ex parte* liability. It can hardly be claimed that such judgments should be regarded as contracts, and yet those judgments have as much force and validity as those growing out of contracts.

A judgment is the decision of the court in a civil or criminal proceeding; it is the determination or sentence of the law; but a contract is a compact between two or more persons, and hence a judgment is not a contract at law. It is conceded that they are not the same in fact, but claimed that they are so in contemplation of law. But we find no legal definition applicable

to the one that can designate the other. As the same legal definition can in no instance be applied to both terms, they can in no instance become convertible. They are regarded as essentially different in business transactions, in legislation, and in all adjudications. In all statutes affecting them they are treated as entirely distinct and different. The one is the result of private action; the other the result of the law as determined by an authorized tribunal. The one is produced by the parties in interest; the other is the determination of a disinterested person. The one has to be proved; the other proves itself.

But some judgments are more nearly assimilated to contracts than others. Where a judgment is rendered to enforce the obligation of a contract, it approximates, but still it is not the same; it does not create this obligation; it only creates the authority under which that obligation is enforced.

In a large portion of judgments there is no such analogy; no approximation.

If a judgment is not the result of a voluntary contract, it can not have the same analogy as that which is ordered to enforce a contract; and hence the judgment in question can have no such analogy. This judgment was not rendered upon a contract. It was only for costs and charges growing out of a proceeding *in rem*, a proceeding resulting from no personal obligation or contract expressed or implied. The partition proceeded from the accidental relation of the parties from their joint and common interest in the land, and was the consequence of the law upon that relation. The costs were an incident of the partition, and the judgment for costs the result of that incident, and hence it has no affinity to the obligation of a contract.

True, this judgment creates an obligation, but not such an obligation as comes within the letter or spirit of the constitution. It is an obligation imposed by law, and not the obligation of a contract made by the parties.

If a judgment is a contract within the protecting clause of the constitution, as claimed, then it must follow that if rendered under the valuation law it would be subject to its provisions, although rendered upon the obligations of a contract made prior to that law. It would be no less a contract if rendered subsequent to the passage of the valuation law, and as the old obligations would enter into and be superseded by the new judgment contract, it follows that this view of the judgment would impair those old obligations, and thus violate the constitution.

We can find no decision that will justify the position urged

by defendant in error. There have been many decisions in the supreme court of the United States bearing directly upon this clause in the constitution, but none of them go so far as to make it applicable to any other obligation than that of a contract voluntarily made between parties.

Bronson v. Kinzie, 1 How. 316, originated in a mortgage contract, and the case turns upon the principle that the rules of law and equity in relation to mortgages entered into and formed a part of the contract. It refers particularly to the laws in force "when the contract was made," and has no application to those in force when the decree was rendered.

The same principle prevails in *McCracken v. Hayward*, 2 How. 608.

In *Baltimore etc. R. R. Co. v. Nesbit*, 10 How. 398, it was held that "it must certainly be shown that there was a perfect investment of property in the plaintiff in error by contract with the legislature, and a subsequent arbitrary divestiture of that property by the latter body, in order to constitute these proceedings an act impairing the obligation of contract." If we adhere to that rule and apply the analogy to transactions made by individuals, we must arrive at the conclusion that unless obligations are created by contract within the legal acceptance of that term, they are not protected under the constitution; and as a judgment creates no such obligation, it can not come within the rule.

But it is contended that if a judgment is not a contract, the sale under the execution would still be valid, even if there was no valuation as required by statute; and authorities are cited in support of this position. We readily concede that if the record in this case was silent in relation to the valuation and sale at the price provided by law, that it might well be presumed the officer had done his duty and had made a valid sale. But the record in this case expressly shows the contrary. It shows that there was no valuation, and that the sale was not according to appraisement. The statute inhibits the sheriff from selling property at less than two thirds its appraised value. That is made an express condition upon which depended the power of the sheriff to sell. This valuation clause was enacted to protect execution debtors from a ruinous sacrifice of property. It would be subversive of that intention, and an outrage upon the rights of such defendants, to decide that it was not necessary to sell the property agreeable to the valuation required by law.

That this matter of valuation under such a law is not merely

directory, but a question of power on which depended the validity of the sale, is abundantly shown by the authorities: *Gantley v. Ewing*, 3 How. 707; *Collier v. Stanbrough*, 6 Id. 21; *Erwin v. Lowry*, 7 Id. 183; *Eddy v. Knap*, 2 Mass. 154; *Williams v. Amory*, 14 Id. 28; *Libbey v. Copp*, 3 N. H. 46; *Harrison v. Doe*, 2 Blackf. 1; *Evans v. Landon*, 1 Gilm. 307.

As the record in this case shows that the property in question was sold at a mere nominal price without regard to valuation, and as the judgment was not rendered upon the obligation of a contract, we conclude that the court erred in deciding the legal title to be in the plaintiff below.

Judgment reversed.

VARIANCE OF EXECUTION FROM JUDGMENT does not make the execution an absolute nullity: *McCollum v. Hubbert*, 43 Am. Dec. 56, and note, where other cases in this series are referred to; see also *Rigg v. Cook*, 46 Id. 462; Freeman on Executions, sec. 43. "An *elegit* bearing *teste* in the defendant's life-time, may, after his death, be extended on his real estate, and the same is true of any other writ so *tested* which may be employed to make real estate answerable for defendant's debt." Freeman on Executions, sec. 37. Courts have generally held that a failure on the part of the sheriff to have property appraised, when the law required it, rendered the sale void: Freeman on Executions, sec. 284.

IT SEEMS THAT JUDGMENT IS NOT CONTRACT; for "in order to prove that a judgment is in the nature of a contract we must supply two of the three essentials of each contract by implication, and the third by some means not yet discovered." Freeman on Judgments, sec. 4. Nor is a judgment such a "contract, express or implied, for the payment of money" within the statute requiring such actions on contracts to be brought in the name of the party really interested, and an assigned judgment may be sued for in the name of the original plaintiff or his personal representatives: *Woolk v. Eberlin*, 3 Alb. L. J. 1.

THE PRINCIPAL CASE IS CITED in *Dean v. Goddard*, 13 Iowa, 295, to the point that if an execution describes the judgment sufficiently to show the authority upon which it is issued, it is sufficient to invest the sheriff with power to sell, and the sale will not be void.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

JONES v. WALKER.

[13 B. MONROE, 163.]

ONE WHO PREVENTS PERFORMANCE OR HAPPENING OF CONDITION PRECEDENT, upon which his liability, by the terms of a contract, is made to depend, can not avail himself of its non-performance.

LIABILITY UPON CONDITIONAL CONTRACT.—A. instituted suit to have a certain contract rescinded, and agreed, for a consideration, to pay B. a certain sum when such rescission was obtained. A. afterwards compromised the suit, and prevented the rescission of the contract. *Held*, that he was liable to B.

ERROR to Bath circuit. The opinion states the facts.

Apperson, for the plaintiff.

Cord and Walker, for the defendant.

By Court, HISE, J. J. R. Jones purchased, by executory contract, from Isaac Gray, two hundred and sixty-one acres of land, at the price of sixty dollars per acre, ten acres of which Jones then sold to James E. Walker for sixty-five dollars per acre, which was paid, and a bond for the conveyance was delivered to Walker. Afterwards, Jones being pressed by judgment and execution, for a large balance of the purchase money due to Gray, institutes a suit in chancery to rescind his contract, alleging that the title was defective. Gray having died, his representative and heirs, made defendants in Jones' bill, answer, and resist the rescission, partly on the ground that Jones had put it out of his power to restore the two hundred and sixty-one acres of land sold to him by the sale of the ten acres to Walker. In this state of case, Jones, by the advice of his

counsel, applied to Walker as a friend and neighbor to make a resale of the ten acres to him in order that he should be enabled thereby to tender back the whole of the land which he had bought of Gray, and place the parties *in statu quo*. Walker agreed, for Jones' accommodation, to let him have the ten acres back again at the same price, of sixty-five dollars per acre, which he had previously paid Jones for it, Jones having represented that it was necessary for him to get back the land to procure a rescission of his contract with Gray, and if Walker would let him have it he could certainly succeed in that object. A written contract was then executed between the parties, to the effect that "for and in consideration of the sum of forty dollars per acre, paid by said Jones, the said Walker sells the same said land, mentioned above, back to said Jones, and binds himself to have reconveyed or return to said Jones his bond for the title to the same. It is, however, agreed that if the said Jones obtains a 'rescindation' of the contract of purchase from said Gray, in relation to the land, of which this is a part, then, in that case, the said Jones is to pay to said Walker twenty-five dollars per acre more, for the ten acres of land hereby sold to him. Witness our hands, this twenty-ninth of April, 1842."

The defendant, Jones, notwithstanding he had thus procured from Walker his ten acres of land, subsequently, on the twenty-third of July, 1844, entered into a compromise with Gray's heirs and representatives, by which, in consideration of indulgence extended, and a considerable abatement of the total amount of purchase money and interest due, he agrees to take the land and risk the title, and wholly abandons his suit for a rescission of the contract of purchase, which was consequently afterwards dismissed.

Jones then refused to pay to Walker the additional twenty-five dollars per acre, and insists that as his suit was compromised and dismissed, though done by himself without the consent of Walker, he had legally discharged himself from responsibility, because the precedent condition, upon the happening of which he was to pay, had not occurred or been performed, though its occurrence or performance was prevented by his own act.

James E. Walker assigned this contract to James C. Walker, who, by the transfer obtaining only the equitable right thereto (inasmuch as it was not legally assignable), institutes this suit in chancery against the assignor and Jones to recover what is justly due to him under said agreement and by reason of the facts stated.

The circuit court rendered a decree in favor of the complainant for fifty-seven dollars and forty-six and two thirds cents, with interest from the twenty-third of July, 1843, the date of the compromise agreement, until paid, and costs of suit, arriving at that precise sum by assuming that Jones had gained by his compromise five dollars and seventy-four and two thirds cents per acre for each acre of the land he had purchased from Gray, including the ten acres which he had purchased from complainant's assignor, and by multiplying the gain per acre by ten. From this decree Jones has appealed to this court, and assigns for error that the decree should have been in his favor. The complainant has filed cross-errors, and contends that the court erred in refusing to allow him two hundred and fifty dollars, the full price for the ten acres of land, and in failing to recognize and give him the benefit of his lien upon the land to secure the payment of the sum decreed.

It is a general principle of law that he who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, can not avail himself of his own wrong and relieve himself from his responsibility to the obligee, and shall not avail himself, to avoid his liability, of a non-performance of such precedent condition, which he has himself occasioned, against the consent of the obligee. The opinions delivered by this court in the case of *Marshall v. Craig*, 1 Bibb, 383-396 [4 Am. Dec. 647], and in the case of *Majors v. Hickman*, 2 Id. 217, fully recognize and approve this principle, and apply it to cases of decidedly inferior merit to the one now under consideration.

In each of those cases it is assumed that the defendants had, by their own acts, without the consent of the covenantees, prevented the performance, by the plaintiffs, of a precedent condition, upon which the liability of the defendants depended, and the defendants are made liable for the whole sum agreed to be paid, without any abatement whatever, although the performance of the conditions precedent, as prevented by the defendants, relieved the plaintiffs themselves from the burden of performing those conditions, which otherwise they would have been required to perform, at the cost of perhaps considerable labor and money, before their right to recovery would be available. In the present case, the whole consideration of the agreement, the ten acres of land, had been executed and passed from the complainant to the defendant, and the complainant had no further duty to perform, money to pay, or service to render, in

order to entitle him to the additional twenty-five dollars per acre; and his right to that was made to depend upon a contingency or condition, the occurrence of which depended in no degree upon his own action or volition, but upon the action or decree of a court of justice, to be rendered in a suit in which the defendant Jones was the party complainant; and which action and decree, and therefore the happening of the contingency, was rendered impossible by the act of Jones himself, whose suit was dismissed as the result of a compromise agreement made by him without Walker's consent.

In the first case referred to, the plaintiff Craig was prevented, and as a consequence relieved, from purchasing in and quieting an outstanding claim to land sold to the defendant, which he contracted to do as a precedent condition to the payment of a certain amount of purchase money to be made by the defendant, by the defendant's having, within the period allowed to the plaintiff, purchased in and quieted the claim himself; yet, it was decided that the plaintiff should recover the whole amount of the purchase money, without any abatement of the amount, although he had been relieved from the duty of purchasing himself the outstanding claim by the defendant himself. In the other case, it was decided that an attorney who had been relieved, by the absconding of the defendant, who lay under a prosecution for felony, from the duty of attending to his defense, and prevented from performing the condition precedent upon which his fee was payable—to wit, that the defendant should be acquitted and discharged from the prosecution—was entitled to recover the whole amount of such fee without abatement.

Even if the court, now, should not be inclined to give to the principle of law, as stated, as broad an application as in the case of *Marshall v. Craig* or *Majors v. Hickman*, *supra*, yet it is considered that it has an appropriate application to the case under consideration, which presents more meritorious claims to the full benefit of the rules stated than either of the cases referred to. Wherefore, the decree of the circuit court is reversed upon the cross-errors, and cause remanded, with direction that a decree be rendered in favor of the complainant for the sum of two hundred and fifty dollars, with six per cent. interest from the twenty-third of July, 1844, the date of the compromise, until paid, and his costs of suit; and if not paid upon a day given, that the complainant have his lien enforced upon the ten acres of land.

IF PERFORMANCE OF OBLIGATION IS PREVENTED by one of the parties to a covenant, the party bound to perform is thereby excused: *Marshall v. Craig*, 4 Am. Dec. 647. So if the obligee is the cause of the non-performance of a covenant, the obligor is thereby discharged: *Kennedy v. Kennedy*, 5 Id. 629; see also *Dey v. Dox*, 24 Id. 137.

McCULLOCH v. SCOTT.

[13 B. MONROE, 172.]

PARTY WISHING TO RESCIND SALE OF JACK, FOR FRAUD, BY TENDERING him back to the seller, must do so absolutely, by leaving him in the seller's stable or upon his premises, and must not, after the seller's refusal to accept him, take him home and use him as his own.

ONE WHOSE TENDER OF CHATTEL FOR PURPOSE OF RESCINDING SALE IS REFUSED, and who takes it back and uses it as his own, thereby waives the benefit of his tender, and his remedy is an action at law for damages. In such a case his bill for a rescission must be dismissed without prejudice to such action.

APPEAL to Montgomery circuit. The opinion states the facts.

Hazlerigg, for the appellants.

Apperson, Farrow, and Peters, for the appellees.

By Court, MARSHALL, J. Without expressing any opinion upon the question of fraud involved in this case, we are of opinion that the complainants were not entitled to a decree rescinding their purchase of the jack, and were therefore entitled to no relief on their bill. If there was a fraud, as alleged, in the sale of the jack to them, and if they tendered back the animal in due time, as alleged, and if they might thus have rescinded their purchase and entitled themselves to a restoration of the notes executed for the purchase money, notwithstanding Scott's refusal to rescind, still, as they took the jack home after the refusal, and used him as their own, and put him to a number of mares, and did not merely take care of him, it seems to us that they waived or lost the benefit of their tender, and made the jack their own, with the right only of suing for such damages as they may have sustained by the fraud, if one was practiced on them in the sale.

If when the tender was made the complainants had a right to rescind the contract for fraud, they might, notwithstanding the refusal of Scott to rescind, have left the jack in his stable where they had placed him, and have stood upon their right of rescission, or they might, notwithstanding their tender, have re-

taken or retained the jack. Their tender, if they had a right then to rescind at their option, was, though refused, a rescission, if they chose to consider it so. They, however, were not concluded by it, but had a right, at their election, either to stand by the tender and rescission, or submitting to the refusal to hold on to the property and the purchase, and claim damages only for the fraud. They could not retain the jack as their property and at the same time rely upon the previous tender as a rescission; nor could they, at their own will, reserve the right to elect between these alternatives at a future time. By leaving the jack upon Scott's premises, they would have demonstrated unequivocally their determination to abide by the tender and rescind the contract, and they could not afterwards have reclaimed the animal against the consent of Scott. But when, upon the refusal of their tender, they took the jack away without intimating that they considered the purchase as rescinded, or meant to insist upon their tender, and that they took the jack merely to prevent his suffering or being injured by neglect, the transaction assumes the appearance of a mere proposition, which, being refused, is withdrawn or disregarded. And as Scott, after rejecting the tender and permitting the jack to be taken away without explanation or reservation, could not have reclaimed him on the next day or at the end of a month, so the other party, after submitting to the rejection of their tender, and after, without explanation or protest or necessity, taking the animal back and putting him to service as if he were their own, could not, at any definite period, go back to their tender and claim that the purchase was thereby rescinded; that they had been keeping and using Scott's jack, and that they were not bound to pay for him. If they could do this at the end of seven weeks, they might do it at any time within five years.

We think a purchaser is not allowed thus to speculate on events, by silently or even openly reserving the right, at his own option, of considering the contract as rescinded or not rescinded by his tender. In the present case, it does not appear that, from the time of Scott's refusal up to the commencement of this suit, which was an interval of seven or eight weeks, the complainants had ever claimed or asserted that the contract was rescinded, or that the jack was not their property; on the contrary, they treated him as their own, and instead of placing him in the hands of a farrier, or having him treated for alleged disease, they put him to a service by which he might have been and probably was injured.

Upon the whole, therefore, we are of opinion that they can not rely upon their tender as a rescission of their purchase, but that if defrauded, as they allege, they can only recover damages for the fraud. And as, according to the well-settled doctrine upon the subject, the court of equity will only interpose in such cases to effectuate a rescission of the contract, and will not entertain a bill for the recovery of damages when there has been no rescission, or nothing entitling the purchaser to it, but will leave him to his legal remedy, which is not only adequate but peculiarly appropriate, it follows that the bill should have been dismissed, not absolutely, but without prejudice. As the court could not have given relief, if satisfied that a fraud had been committed as alleged, it should not have undertaken to decide absolutely that there was no fraud, and by an absolute dismissal of the bill have defeated, or at least obstructed, the resort to the appropriate forum. Wherefore, the decree dismissing the bill absolutely is reversed, and the cause is remanded, with directions to dismiss the bill without prejudice to the remedy at law.

FRAUD IN SALE OF CHATTEL does not bar a recovery on a note given for the price, unless the vendee returns the article on discovering the fraud, or shows it to be entirely worthless. Vendee can not retain the property and treat the sale as void: *Burton v. Stewart*, 20 Am. Dec. 692, and note. So a party deceived in a contract of sale may rescind, but in order to do so in such a manner that he may recover the consideration money, he must give the vendor notice within a reasonable time of the cause of the rescission, and tender a return of the property if within his power: *Fowler v. Williams*, 4 Id. 579. A purchaser who would rescind a sale, and recover back the consideration, must place the vendor in the same situation as he was before the sale: *Borrekins v. Bevan*, 23 Id. 101, note. But in a warranty sale conditioned to return the articles upon a breach of the warranty, an offer to return is equivalent to an acceptance by the vendor; the sale is thereby rescinded, and the vendee may maintain an action for money had and received, or defend an action brought for the purchase money: *Allen v. Anderson*, 39 Id. 197.

FOR FULL DISCUSSION OF WHAT AMOUNTS TO RESCISSION, and when the right to rescind may be exercised, see *Masson v. Bovet*, 43 Id. 651, and note. See also 1 Wharton on Cont., sec. 282 et seq.

FLEET v. HOLLENKEMP.

[13 B. MONROE, 219.]

NEW TRIAL WILL NOT BE GRANTED ON ACCOUNT OF EVIDENCE DISCOVERED after the defendant had closed his evidence but before his case was submitted to the jury. Defendant ought to have moved the court to suspend the argument and let him offer the evidence at the time it was discovered.

NEW TRIAL WILL NOT BE GRANTED FOR NEWLY DISCOVERED EVIDENCE if the applicant has been guilty of negligence in not sooner discovering and producing it.

NEW TRIAL OUGHT NOT TO BE AWARDED TO PERMIT PARTY to offer evidence, unless it appears that such evidence, if received at the former trial, ought to or might have changed the result.

EXEMPLARY DAMAGES may be awarded in actions upon the case as well as in actions of trespass.

PROPRIETORS OF DRUG STORE ARE ANSWERABLE FOR ACT OF THEIR CLERK, whether done through ignorance or by design, and whether with or without their knowledge, whereby he intermixes a poisonous drug in compounding a prescription for a customer, whereby the latter suffers injury.

DRUGGIST'S DUTY IS TO SO QUALIFY HIMSELF, or to employ those who are so qualified, to attend to the business of compounding and vending drugs and medicines, that one drug may not be sold for another, and so that when a prescription is presented to be made up none but the proper medicines shall be used in mixing and compounding it. If his customer is injured by the mistake of the druggist or his clerk in using one drug for another, the druggist is not exonerated because due and reasonable or even extraordinary or unusual care and diligence were used.

APPEAL from Kenton circuit. The opinion states the facts.

Harlan and Callender, for the appellants.

Moar and Spillman, for the appellee.

By Court, HISE, J. John Hollenkemp sued William T. Fleet and Samuel P. Semple, partners in the business of vending drugs by retail, in an action upon the case, for having, through negligence, permitted a portion of the poisonous drug called "cantharides" to be intermingled with some snakeroot and Peruvian bark which he had purchased at their drug store, and which he, being then indisposed, by the advice of his physician, had taken as medicine for his restoration, not knowing that the poison had been mixed with the bark and snakeroot, and that in consequence he had been made very sick, endured great suffering, pain, and agony, and that his health had been thereby permanently injured. The defendants appeared, and pleaded not guilty. There was a trial, verdict, and judgment against the defendants for one thousand one hundred and forty-one dollars and seventy-five cents damages, and costs of suit.

The defendants moved the court to set aside the verdict and judgment, and to grant them a new trial, upon various grounds, which may be all summed up and stated as follows:

1. Because of the discovery of important evidence made during the progress of the trial, for the first time, and which they

allege they had neither the opportunity nor power to procure and offer to the jury.

2. Because the damages found by the jury were excessive, and unwarranted by the facts of the case and the proof in the cause.

3. Because the court erred in giving the instructions asked by the plaintiff's counsel, and in refusing those asked by the counsel of the defendants.

The court refused to grant a new trial, and defendants' motion to that effect was overruled. The defendants filed their bills of exceptions to this and other decisions of the court given pending the trial. The evidence was reduced to writing and certified, and the defendants have appealed to this court.

The evidence collectively presents, in substance, the following state of facts: That the plaintiff having been sick for some time had improved and was convalescent. A tonic preparation was recommended by the attending physician, who made out a written prescription for the plaintiff, as follows: That he should procure two ounces of snakeroot and two ounces of Peruvian bark, in the form of powder, to be mixed and divided into four portions; to be made into a tea, by the application of three pints of water to each portion of snakeroot and bark; the patient to take half of a tea-cupful of the decoction twice each day. This prescription was sent by the plaintiff to the defendants' drug store to be filled. There the two ounces of snake-root and two ounces of Peruvian bark were, by the clerk, in the presence of one of the defendants, put into a mill to be ground into powder, and passed through the mill, and thus pulverized. It was then put up in separate papers, as directed by the prescription, and delivered to the plaintiff's messenger, who carried them to the plaintiff. A tea was made of one of the potions. The patient drank a half tea-cupful of the preparation, and shortly afterwards, the effect produced by the dose was so unexpected and extraordinary that the same physician was sent for who had drawn up the prescription, who, upon his arrival, found his patient laboring under all those violent symptoms which, according to all the evidence on the subject, are produced by cantharides when taken in sufficient quantity into the stomach. The physician, his suspicions being aroused, procured and examined the three remaining potions of the medicine, as compounded at defendant's drug store, and easily detected the presence of Spanish flies in the mixture. They were taken to the drug store to inquire into the matter. There the potions

were recognized as having been compounded and put up in that store, by the clerk, and the fact that some Spanish flies had been, in some way, mixed with the bark and snakeroot was detected and admitted.

It is unnecessary to state in detail the symptoms and effects exhibited by the patient after taking one dose of the tea as directed; the proof is conclusive and satisfactory that they were most violent, dangerous, and excruciating, and precisely such as would be produced by a sufficient dose of cantharides. It is true that there was contrariety of opinion expressed by the physicians examined as to the durability and permanency of the injurious effects produced by this drug. The attending physician gave it as his opinion that the symptoms exhibited were produced by the cantharides, and that the plaintiff's health had been permanently injured by the dose which he had taken. Several other doctors examined gave it as their opinion that generally the effects of this drug, unless taken in sufficient quantity to produce death, would be only temporary and evanescent. That they had never known an instance where the health of a person surviving the immediate effects produced by cantharides had been permanently injured; though they did not deny but that such might be the consequence in some cases, where the peculiar condition of the patient's system was such as that the poisonous quality of the drug might be more pernicious and virulent in its effects, and that in special cases it might cause permanent ill health.

There was evidence introduced by the defendants which was intended to screen and exempt them and their agent or clerk from the charge or imputation of having been guilty of inexcusable negligence in compounding and putting up the medicines, to wit, the snakeroot and Peruvian bark, as required by the prescription furnished by the plaintiff's medical adviser.

The physicians examined as witnesses all concur in proving that the violent and injurious effects produced upon the plaintiff by the dose which had been taken by him could not have resulted if it had contained nothing but the snakeroot and Peruvian bark; that when taken in the quantities as administered to plaintiff they are harmless and innocent drugs, and the fact, as deduced from all the testimony in the cause, is conclusively established that although the plaintiff sent them a prescription for snakeroot and Peruvian bark only, the defendants, being druggists, sent him in return, say by mistake, a compound made up of the drugs required, intermixed with a

most pernicious and deleterious poison, which in fact bears no kind of resemblance to the medicines named in the prescription, and the mingling of which with the innocent medicines sent for by plaintiff was caused by improperly pulverizing the root and the bark, by grinding them in the same mill in which Spanish flies had been previously ground.

To sustain the ground taken for a new trial that new evidence had been discovered pending the trial, which circumstances rendered unavailable, the defendants rely upon the affidavits of Reuben Broaddus and T. N. Wise. Broaddus states in substance that he knew the plaintiff as far back as 1842, and that he then and frequently afterwards complained of weakness and feebleness, and that his health was so frail that sometimes he was not able to perform hard labor; that what he knew upon the subject was not disclosed to the defendants until their attorney had commenced his argument to the jury.

Assume these statements to be true, they do not sustain the motion for a new trial; because—

1. If the testimony of Broaddus would have been important in aid of the defense, upon motion to the court, based upon the facts stated, the argument of the case would have been suspended, and Broaddus might have been sworn as a witness, and would have been allowed to give evidence to the jury before their retirement. But although the witness was present, and defendants knew what he would prove before the case had been given to the jury, they did not offer to introduce him: *Higden v. Higden*, 2 A. K. Marsh. 43.

2. Because the defendants, from the facts in the record, are convicted of negligence with respect to the preparation of their defense. It appears that at the term preceding that during which the trial took place the cause had been fully investigated before a jury, and the evidence heard, but the jury failing to agree, there was a mistrial. The same evidence for plaintiff was no doubt then given to the jury upon which he relied in the final trial; and the defendants had ample time, by reasonable inquiry, to have procured witnesses to establish the fact of the importance of which they could not have been ignorant, if it could have been done, to wit, that the ill health of the plaintiff had been of long standing, and not of recent origin. As bearing upon the question of the amount of damages to be given by the jury, the plaintiff on the final trial, and, as is supposed, at the previous mistrial, introduced proof to the effect that his general health was good; the defendants could and should,

therefore, by the exercise of due and proper diligence, have procured countervailing evidence, if the fact existed, to show that plaintiff's bad health had previously existed; and that it was not, therefore, caused by the drugs prepared for him by them or their clerk. The present ill health of the plaintiff, and its true cause, was the main point of fact in issue and contested before the jury, and the defendants staked the case upon their preparation, as made, and can not be indulged with a new trial because they may have ascertained during the trial that they could have strengthened their proof upon the issue in question, and especially when their witness was present before the argument to the jury was closed, and they might have had the benefit of his testimony upon application to the court: *Chambers v. Chambers' Adm'r*, 2 A. K. Marsh. 349; *Wells v. Phelps*, 4 Bibb, 563.

The affidavit of Dr. Wise does not give any material strength to the demand for a new trial. He merely states that he had visited the plaintiff professionally since he had taken the compound prepared for him at the drug store of the defendants, and that his opinion was that plaintiff's disease was an affection of the mucous membrane of the stomach and bowels, and not connected with the kidneys and bladder, or urinary organs. It is not perceived how Dr. Wise's statement could have produced a different verdict of the jury necessarily; for the disease attributed to the plaintiff by Dr. Wise may well have been produced by the cantharides taken by him. The proof in the cause of its effects, and generally of the symptoms and effects exhibited by the plaintiff, as consequent upon the dose administered to him, would make the conclusion reasonable that his disease, as described by Dr. Wise, was thereby produced.

The defendants have not shown that Dr. Wise's testimony, had it gone to the jury upon the trial, either could or ought to have induced the jury to have rendered a more favorable verdict for defendants: *Barrett v. Belshe*, 4 Bibb, 349. So far, therefore, as the motion for a new trial was predicated upon the affidavits of Broadbuss and Wise, and the accompanying affidavits of the defendants, it could not have been properly sustained.

The next question presented is, that the court should have sustained the motion for a new trial, because the damages are excessive.

There is no fixed and certain criterion of damages for personal injuries, similar to those sustained by the plaintiff in this action. The question as to their amount is within the sound

and reasonable discretion of the jury. The damages given may be more or less exemplary, or otherwise, as the circumstances of aggravation or extenuation characterizing each particular case may reasonably require.

There is a class of personal injuries, such as slander, libel, malicious prosecution, and including injuries to a person's health, business, and property, caused by indirect means, unattended with force, and for redress of which the remedy is by an action upon the case, and not by the action of trespass, for which a jury may give exemplary damages, as well where the action is in case as when it is in trespass; and whether exemplary damages should or should not be given does not depend upon the form of action so much as upon the nature and extent of the injury done, and the manner in which it was inflicted, whether by negligence, wantonness, or with or without malice: *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. 388 [27 Am. Dec. 682]; *Linsley v. Bushnell*, 15 Id. 235; *McLane v. Sharpe*, 2 Harr. (Del.) 481.

In the present case, the damages given by the jury can not be regarded as so excessive as to authorize this court to reverse the judgment on that ground. From the evidence in the cause, the jury had the opportunity and the right to decide the question of fact as to the extent of the injury done to the plaintiff's health, and if the injury was considerable, protracted, or permanent, the amount of the damages found by them was, if even sufficient, not excessive, and the verdict and judgment ought not, on that ground, to be disturbed.

But it is urged that the circuit judge improperly instructed the jury upon the law of the case. Upon motion of the attorney for the plaintiff, the court gave the following instruction: No. 1. "If the jury believe from the evidence that the defendants Fleet and Semple were the proprietors of the drug store in the city of Covington at which the prescription, alluded to in the evidence, made for the plaintiff by Dr. Whitehouse, was compounded, and that said prescription, as put up at said drug store, contained Spanish flies, or cantharides, and that the plaintiff, in consequence of taking a part of it, was made sick or injured thereby, they ought to find for the plaintiff, even although they may believe that defendants were ignorant of the fact that said prescription did contain said ingredient." Although the words of this instruction are injudiciously selected and arranged, yet, if its meaning is not misapprehended, it embraces in its terms a proposition of law pertinent to the case and ap-

plicable to the facts presented to the jury by the evidence. Of course the attorney who wrote the instruction, and the judge who gave it, in using the expressions as to the "prescriptions containing Spanish flies," and as to the plaintiff's having taken a portion of the prescription, etc., have reference to the mixture compounded at the drug store, and not to the written prescription of the physician, intended as a direction to the druggists as to the drugs to be compounded. If the plaintiff sent a prescription to the defendants' drug store, containing directions that snakeroot and Peruvian bark in certain quantities should be furnished, ground into powder, and mixed; then, if the defendants, or any employee of theirs in their drug store, in filling such prescription, whether ignorantly or by design, whether with or without the knowledge of the defendants, they being proprietors, did intermix the poisonous drug cantharides, or Spanish flies, with the bark and snakeroot, and if, in taking this preparation or mixture as medicine, the plaintiff was injured, the defendants, being owners of the drug store, are legally responsible in damages to the plaintiff for the accident, if it was one, and for the outrage, if it was designed.

It is a well-established rule and principle of law, that a vendor of provisions for domestic use is bound to know that they are sound and wholesome, at his peril: *Van Bracklin v. Fonda*, 12 Johns. 468 [7 Am. Dec. 339]. It is a sound and elementary principle of law, that in contracts for the sale of provisions, the party, by implication, who sells them undertakes that they are sound and wholesome: 3 Bla. Com. 165.

In 3 Bla. Com., by Chitty, 91, it is laid down in general terms: "Injuries affecting a man's health are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution, as by selling him bad provisions or wine, by the exercise of a noisome trade, or by the neglect or unskillful management of a physician, surgeon, or apothecary—these are wrongs or injuries unaccompanied by force for which there is a remedy in damages by a special action on the case."

Now, if a man who sells fruits, wines, and provisions is bound at his peril that what he sells for the consumption of others shall be good and wholesome, it may be asked, emphatically, is there any sound reason why this conservative principle of law should not apply with equal if not with greater force to vendors of drugs from a drug store, containing, as from usage may be presumed, a great variety of vegetable and mineral substances of

poisonous properties, which if taken as medicine will destroy health and life, and the appearance and qualities of which are known to but few, except they be chemists, druggists, or physicians. The purchasers of wines and provisions, by sight, smell, and taste, may be able, without incurring any material injury, to detect their bad and unwholesome qualities; but many are wholly unable, by the taste or appearance of many drugs, to distinguish those which are poisonous from others which are innoxious, so close is their resemblance to each other; purchasers have, therefore, to trust the druggist. It is upon his skill and prudence they must rely. It is therefore incumbent upon him that he understands his business. It is his duty to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself, or to employ those that are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that, when a prescription is presented to be made up, the proper medicines, and none other, be used in mixing and compounding it. As applicable to the owners of drug stores, or persons engaged in vending drugs and medicines by retail, the legal maxim should be reversed. Instead of *caveat emptor*, it should be *caveat venditor*. That is to say, let him be certain that he does not sell to a purchaser or send to a patient one drug for another, as arsenic for calomel, cantharides for or mixed with snakeroot and Peruvian bark, or even one innocent drug, calculated to produce a certain effect, in place of another sent for and designed to produce a different effect. If he does these things, he can not escape civil responsibility, upon the alleged pretenses that it was an accidental or an innocent mistake; that he had been very careful and particular, and had used extraordinary care and diligence in preparing or compounding the medicines as required, etc. Such excuses will not avail him, and he will be liable, at the suit of the party injured, for damages at the discretion of a jury.

The defendants' attorney moved the court to instruct the jury as follows: 1. If from the evidence the jury believe that the defendants, in preparing the prescription, used due and reasonable skill, care, and diligence, they must find for defendants; 2. If from the evidence the jury believe that the defendants, in putting up the prescription, used extraordinary or unusual care, they must find for the defendants.

These instructions were not given, but properly refused by

the court. The rule as to the degree of care and diligence necessary to be used in certain cases to exempt a party from liability, and as to the extent or degree of negligence necessary to devolve civil responsibility upon the party guilty thereof, do not apply to the present and similar cases. It is absurd to speak of "degrees of diligence and of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground. If mistake or accident could excuse the sending of a medicine different from that applied for, which we do not admit and can not readily conceive, there could have been neither mistake nor accident in this case, because the fact of the previous use of the mill was known to the vendors, and they are absolutely responsible for a consequence which that knowledge enabled them and made it their duty to avoid. Even accidents or mistakes should not occur in a business of this nature, and they can not ordinarily occur without there has been such a degree of culpable, if not wanton and criminal, carelessness and neglect as must devolve upon the party unavoidable and commensurate responsibility. We were asked by the attorneys in their arguments, with some emphasis, if druggists are to be, in legal estimation, regarded as "insurers." The answer is, that we see no good reason why a vendor of drugs should, in his business, be entitled to a relaxation of the rule which applies to vendors of provisions—which is, that the vendor undertakes and insures that the article is wholesome. Sound public policy in relation to the preservation of the health and even of the lives of the people would seem to require that this rule should have a rigid and inflexible application to cases similar to the one under consideration. As the responsibility of the defendants in this case does not depend upon the degree of care or diligence or negligence used by them, but upon the naked fact that when requested to compound a medicine for plaintiff, to be composed alone of snakeroot and Peruvian bark, the preparation sent to the plaintiff contained also the poisonous drug cantharides, which had been recently ground in the same mill, the taking of which caused him great pain, suffering, and sickness, if it has not permanently injured his health. The instructions asked by the defendants were properly refused.

The instruction upon the subject of damages, given by the court in lieu of the one asked by plaintiff's attorney, though

framed and expressed in language not so well chosen and adapted to present the proposition of law therein intended to be set forth as other language would have been, yet, as understood, the instruction is in substantial conformity to the views of this court as expressed in this opinion. Wherefore the judgment of the circuit court is affirmed.

WILSON v. SOPER.

[13 B. MONROE, 411.]

PERSONAL REPRESENTATIVES OF DECEASED PARTNER BECOME TENANTS IN COMMON with survivor, of all the partnership property or effects in possession, while the choses in action vest in the survivor, who has the right to control the partnership effects for the purpose of paying the debts and settling up the business.

ADMINISTRATOR OF DECEASED PARTNER, BEING TENANT IN COMMON WITH SURVIVOR, has power to dispose of an undivided moiety of the stock of goods on hand, and thus vest the surviving partner with the title to the whole stock.

UPON VOLUNTARY DISSOLUTION OF PARTNERSHIP, the partners may agree that the partnership property may be the property of one of the members, and if such agreement be *bona fide*, it will be given full effect.

LIEN OF PARTNERSHIP CREDITORS FOR PAYMENT OF THEIR DEBTS is not upon the partnership property, but is derived from one of the partners who has a lien upon the partnership property for the payment of the partnership debts; and such lien by a partner, being derivative, ceases when he has divested himself of his interest. If the means by which he has divested himself of this interest is fraudulent, the creditors may be relieved in a court of chancery.

AGREEMENT—ABSOLUTE SALE.—A. buys from B., administrator, etc., certain property, for which he gives his note, the sale to become absolute when A. should furnish security for the payment of said note; A. is afterwards appointed guardian of B.'s intestate, and A. and B. agree that A. shall hold the above purchase price, and charge himself with it as guardian: *Held*, that the agreement was good, and that the sale became absolute.

ADVANCES TO FIRM AND ADVANCES FROM IT to one of its members do not constitute debts strictly speaking, but are only items in the account between the partners in the winding up of the concern.

SURVIVING PARTNER WHO HAS BOUGHT INTEREST OF DECEASED PARTNER may make an assignment of the merchandise for the benefit of his creditors, and the claimants under this assignment have a right to its proceeds, and also to all the debts which were created after the purchase made by the surviving partner.

SURVIVING PARTNER HAS RIGHT TO APPLY ASSETS OF FIRM to the payment of partnership debts. He may prefer one creditor to another, and if he makes an assignment for the benefit of part of the creditors, they may under it entirely satisfy their debts. This does not increase the liability

of the estate of the deceased partner, as it makes no difference to it whether the assets are distributed ratably or applied to the payment of some debts to the exclusion of others.

ADMINISTRATOR OF DECEASED PARTNER HAS RIGHT IN EQUITY to have all the partnership effects of every description, including all the debts due to the firm, applied to the payment of all the debts owed by it.

MONEY PAID TO GUARDIAN MUST BE RETURNED TO ADMINISTRATOR when it is necessary for the payment of debts of deceased.

SURETIES UPON BOND OF GUARDIAN ARE RESPONSIBLE TO ADMINISTRATOR for money which, if paid to the wards, would have to be returned by them to the administrator to pay debts of the deceased. The liability of the sureties is not increased by making them thus directly responsible to the administrator, who, for the benefit of creditors, is entitled to an equitable substitution to the right of the wards in money in the hands of the guardian.

ERROR to Bourbon circuit. The opinion states the facts.

Harlan and Hawes, for the plaintiffs in error.

Davis, Smiths, and Cord, for the defendants.

By Court, SIMPSON, J. Mark Duvall and Samuel J. Duvall were partners in merchandising, and at the time of the death of the latter, which occurred in September, 1849, the firm owed a debt of considerable magnitude. After his death, J. J. Moore administered on his estate, and in conjunction with Mark Duvall, the surviving partner, made an invoice of the stock of merchandise on hand; one half of which the administrator sold to the surviving partner, and took his note for the price, with the understanding that the contract of sale was not to be considered executed until the purchaser gave security for the payment of the purchase money. The parties afterwards agreed that the purchaser should be appointed guardian for the children of the deceased partner, and when he was so appointed, and had given bond with security, the sale should be regarded as consummated, and the price of the goods remain in his hands as guardian. He was accordingly appointed guardian, and having executed bond with security, was considered as the owner of the goods by purchase, and used them as his own individual estate. He subsequently executed a deed of trust, transferring all the goods on hand, and all the debts due to the firm, and such as had accrued during the time that he had carried on the business in his own name after the death of his partner, and other individual property and effects, to trustees, to be applied to the payment of certain designated debts in the order prescribed by the deed of assignment. Some of his creditors exhibited their bills in chancery, impeaching the deed upon the ground of

fraud. The administrator of the deceased partner filed a bill, insisting that he had a lien on the whole of the partnership assets for the payment of the partnership debts, and that this lien was available against the deed of assignment. Several of the partnership creditors were made parties in the suits, who also asserted a claim to a lien on the partnership effects, for the payment of their debts. All the suits were consolidated and tried together.

The circuit court decreed that the partnership creditors were entitled to the proceeds of all the goods contained in the deed of trust, and also all the debts due for merchandise, including those that were created after the dissolution, as well as those that were due to the partnership, and also that they were entitled to the price of the goods sold by the administrator to the surviving partner, for which he and his sureties in his guardian's bond were held liable; but the property embraced in the deed of trust, which the guardian had conveyed for the indemnity of his sureties, and which was his own individual estate, was first subjected to the satisfaction of this liability.

The sureties in the guardian's bond, and the beneficiaries under the deed of trust, have appealed from that decree.

The circumstances relied upon to establish fraud in the execution of the deed of trust we deem insufficient for that purpose, so that the questions presented for consideration are those that arise out of the sale made by the administrator of the deceased partner, and the subsequent execution of the deed of trust by the surviving partner.

1. Upon the dissolution of a partnership by death, the personal representative of the deceased partner becomes tenant in common with the survivor of all the partnership property and effects in possession, there being a distinction between such property in possession and mere choses in action, debts, and other rights of action belonging to the partnership, which vest in the survivor: *Gow on Part.*, c. 5, sec. 4, p. 377; *Story on Part.*, sec. 346, p. 517. The surviving partner, however, has the right to control and dispose of the partnership effects for the purpose of paying the partnership debts and liabilities, and to settle and wind up the business of the firm.

2. As the administrator of the deceased partner was tenant in common with the survivor, of the partnership effects in possession, it results that he had the power to sell and dispose of one undivided moiety of the stock of goods on hand, and thereby vest the surviving partner with the title to the whole stock. It

is competent for the partners, in the case of a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them, and if the agreement be made in good faith and for a valuable consideration, it will transfer the whole property to such partner free from the claims of the joint creditors: Story on Part., sec. 358, p. 536. This result would seem necessarily to ensue, in such a case, from the principle that the creditors of the partnership have no lien upon the partnership effects for their debts; but whenever such a lien can be asserted, it is derived from one of the partners, and is the equity of the partner, operating to the payment of the partnership debts: 3 Kent's Com. 65; Story on Part., sec. 360, p. 538. Being derivative merely, it fails whenever the partner has done any act by which he has divested himself of the lien, the benefit of which is claimed by the creditors. If the agreement by which the right to the partnership effects is transferred to one of the partners by the other partner be fraudulent, and done with the intent to defeat the creditors in the collection of their debts, they would have a right to apply to a court of chancery to be relieved from the effect of the fraud; but in such a case, they would have an original and independent equity, not derived from the partner who made the transfer, but founded on the fraudulent conduct and acts of the parties to the transaction.

We are not able to perceive any good reason why the sale made by the administrator to the surviving partner of the stock of merchandise on hand should not have the same effect that a sale made by his intestate in his life-time would have had. Such a sale would have invested the purchaser with a full and complete title to the property, discharged from the lien of his partner, and the *quasi* lien of the joint creditors. As the administrator was tenant in common with the surviving partner of the goods on hand, the sale made by him vested the purchaser with the absolute title to them. The partnership goods were converted by the sale into individual property, the community of interest was terminated, and the lien resulting from the partnership was, as a necessary consequence, parted with and surrendered.

There is a marked distinction between this and the case of *Smith v. Haviland*, referred to by the chancellor in the decision of the case of *Deveau v. Fowler*, 2 Paige, 400. There the administrator of a deceased partner assigned all his interest in the partnership effects to the survivor, under an agreement that the latter should pay and discharge all the debts of the firm, and it

was decided that the agreement only transferred the interest of the administrator in the surplus after the payment of debts, and consequently did not destroy his lien or equity to have so much of the partnership property applied to the payment of the debts as was necessary for that purpose. The ground of that decision was evident. The interest of the administrator in the partnership effects was all that was sold. It was the same interest which his intestate had, and which, if assigned by him in his life-time, would only have invested the purchaser with the assignor's share of the surplus, if any there should be, after the partnership affairs were fully wound up. But in this case the administrator sold to the survivor one half of the goods specifically, not subject to the payment of debts, but for their full value and without any reservation. By the purchase the goods became the sole property of the purchaser, and the proceeds of the sale were assets in the hands of the administrator. It does not appear that the parties made any arrangement for the payment of the debts, but it may be inferred from their conduct that they regarded the debts due to the firm as sufficient to discharge all of its liabilities, and that the administrator relied upon that portion of the assets of the firm as sufficient for the payment of its debts.

It is contended, however, that the sale made by the administrator was conditional, that the condition was not complied with, and that consequently the title to the goods did not pass to the purchaser. It appears that the purchaser executed his individual note to the administrator for one half the value of the goods, being the price agreed upon, with an understanding that he was to procure some person to execute the note with him as his surety. The parties afterwards agreed that if the purchaser would obtain the appointment of guardian for the children of the deceased partner, and execute bond and security as such, that the security required by the terms of the sale should be dispensed with, and the price of the goods should remain in his hands as guardian. In pursuance of this agreement, he was appointed guardian, and executed a guardian's bond with approved security. The purchase was then complete, and the title to the goods was vested absolutely in the purchaser. As between the parties themselves, the price of the goods must be regarded as money in the hands of the guardian as soon as he had qualified and executed a bond. The right to demand security upon the note was waived by the administrator, under the supposition that the fund would be sufficiently secured by the guardian's bond; and

by the terms of the contract the purchaser was to retain the price of the goods in his hands as guardian. Although, therefore, the note was not surrendered by the administrator to the purchaser, nor his receipt taken for the amount as guardian, yet the omission of these formalities did not affect the essential nature of the transaction, nor change its real character. The price of the goods must therefore be regarded as money in his hands as guardian, which the administrator may have a right to require him to refund, if it be necessary for the payment of debts.

The administrator, in the suit which he brought, asserted a claim against the partnership effects for the amount of a large debt due from the surviving partner to the firm. That, however, is not a debt against the firm, but it is a debt due to the firm by one of the partners, which will have to be taken into the estimate merely for the purpose of ascertaining the amount of their respective interests in the surplus. But if it were a debt due by the firm to one of the partners, its payment would depend upon the existence of a surplus after the payment of the firm debts. Advances to the firm and advances from it do not constitute debts, strictly speaking, but are only items in the account between the partners in the winding up of the concern: *Story on Part.*, sec. 348, p. 522; *Simrall v. O'Bannons*, 7 B. Mon. 609.

From the principles herein stated, it results:

1. That the surviving partner, being the sole owner of the merchandise, had a right to make an assignment of it for the payment of his creditors, and the claimants under the deed of trust, made by him for that purpose, have a right to its proceeds, and also to all the debts that were created after the purchase made by the surviving partner, during the time he carried on the business in his own name.

2. As the surviving partner had a right to control the assets of the firm, and apply them to the payment of the debts of the partnership, he could legally appropriate them to the payment of any of the debts. He had the right to prefer some of the creditors to others, and therefore the partnership creditors, whose debts were secured by the deed of trust, are entitled to the firm assets contained in the deed, so far as they may be necessary for the payment of their debts. The estate of the deceased partner will not be injured by such an application of the assets of the firm. If the assets are all honestly and fairly applied to the payment of the partnership debts, the liability

to which the estate of the deceased partner will be subjected, if there be a deficiency, is precisely the same, whether they be distributed ratably among all the debts or applied to the payment of some to the exclusion of others.

3. The administrator of the deceased partner has a right in equity to have all the partnership effects of every description, including all the debts due to the firm, applied to the payment of the debts owing by it. The goods on hand are not, however, to be considered as a portion of the partnership effects, as they, by the sale made by the administrator, had been converted into the sole property of the purchaser. Nor can this equity of the administrator deprive any of the firm creditors of the provision made for the payment of their debts by the deed of trust, but it is superior, as against the assets of the firm, to the claim of the separate creditors of the grantor under that deed, inasmuch as the trustees were apprised, when the deed was executed, that a large amount of the debts and choses in action transferred therein were the assets of the firm; and the beneficiaries are affected by such knowledge, if they were ignorant of the fact themselves, which is not at all probable. One member of a firm has no right to appropriate partnership effects to the payment of his individual debts, without the assent of the other partners.

4. The administrator has a right to require the guardian to refund the price of the goods which, by the agreement of the parties, he was permitted to retain in his hands under the supposition that it would not be necessary for the payment of partnership debts. By the deed of trust, a portion of the individual estate of the grantor has been set apart to secure the payment of the amount due by him as guardian, and it should be applied to the extinguishment of that liability. If it should be insufficient for that purpose, the balance remaining unpaid will devolve on the sureties in his bond as guardian. But if the assets of the firm are unequal to the payment of its debts, and the surviving partner should, out of his own estate, including the stock of merchandise that he purchased from the administrator, pay more than his proportion of the residue of the partnership debts left unpaid after all the assets of the firm have been exhausted, he would, to that extent, have a claim for contribution against the estate of the deceased partner, and be entitled to a discount therefor out of the price he agreed to pay for the goods. So much of the fund arising from the sale of the goods, if any, as the administrator may be entitled to,

he must hold as assets to be paid ratably among the creditors, and such of them as are included in the deed of trust, and may, under its provisions, have their debts partially paid, will only have a right to claim a ratable proportion out of this fund, on the unpaid part, and not on the original amount of their demands.

The sureties in the guardian's bond are liable to the administrator for the price of the goods in the hands of the guardian. They would be liable for it to the wards, and as it is necessary for the payment of debts, the latter would have to refund it to the administrator, if they were to collect it on the bond. The liability of the sureties is not increased, by making them responsible directly to the administrator, who, for the benefit of the creditors, is entitled to an equitable substitution to the rights of the wards to the money in the hands of their guardian.

The decree of the court below is, in many of its provisions, inconsistent with the views herein expressed and the principles of this opinion, and is therefore erroneous.

Cross-errors are assigned by some of the defendants, because their claims, as partnership creditors, were not specially recognized and provided for by the decree which was rendered. But their complaint is premature, inasmuch as the court had not determined who were or who were not partnership creditors, but that question remained open for adjudication.

Wherefore the decree is reversed, and cause remanded, with directions to dismiss the bills of the creditors, so far as they attempt to impeach the deed of trust on the ground of fraud, and for further proceedings and decree in conformity with the principles of this opinion.

GRANTEE OF ONE PARTNER BECOMES TENANT IN COMMON with the other partner in the partnership property: *Mumford v. McKay*, 24 Am. Dec. 34, and note.

PARTNERSHIP HAVING BEEN DISSOLVED BY DEATH OF ONE OF THE PARTNERS, or otherwise, if one of the partners afterwards dies, the legal title to all the choses in action which belonged to the partnership becomes vested in the survivor, and the settlement of the partnership devolves upon him: *Kinsler v. McCants*, 53 Am. Dec. 711, and note; *Egberts v. Wood*, 24 Id. 236, and note.

LIEN OF PARTNERSHIP CREDITORS FOR PAYMENT OF THEIR DEBTS: See *Pearson v. Keedy*, 43 Am. Dec. 160, and note; *Bardwell v. Perry*, 47 Id. 687. This lien is dependent upon the continuance of the partnership, and if the partnership is dissolved, or one partner sells his share to the other, the lien is lost: *Bardwell v. Perry*, *supra*; *Ladd v. Griswold*, 46 Id. 443. Upon the dissolution of a partnership by the death of one of the partners, the surviving partner can make a valid assignment of the partnership effects for the benefit

of the creditors of the firm: *White v. Union Ins. Co.*, 9 Id. 726, and note, and either of the partners before dissolution, or all of them afterwards, may appropriate the funds to some creditors in preference to others, or after the death of one of the partners, the survivor, with the consent of the personal representatives of the deceased, may prefer any creditor: *Egberts v. Wood*, 24 Id. 236. But see the note to that case, page 245, where authorities are cited, sustaining the principal case, to the effect that such preference may be given without the consent of the representatives of the deceased.

DECEASED PARTNER'S REPRESENTATIVES may insist that the partnership effects shall be applied to the debts of the firm: *Egberts v. Wood*, 24 Am. Dec. 236.

CASEY v. GREGORY.

[13 B. MONROE, 505.]

IRREGULARITIES IN SALE OF LAND BY SHERIFF DO NOT AVOID SALE, but a sale upon another day than that provided by law will, unless consented to by the execution creditor. His being present at the sale, choosing valuers of the land, and not objecting, is an implied consent.

EXECUTION SALE OF LAND, DURING TERM OF FIVE YEARS' LEASE, which lease although unrecorded is good, and under which the lessee held during his term, passes the subsequently accruing rent to the purchaser.

LANDLORD'S PROPERTY BEING SOLD UNDER EXECUTION MAY BE PURCHASED by tenant in possession thereof, and he is not estopped by the relation which exists between them.

EXECUTION CREDITOR SHOULD KNOW WHEN TIME TO REDEEM EXPIRES, and misinformation by the clerk, in which the purchasers had no agency, is not such an equity as will cause a court of equity to extend the time.

EQUITY HAS NO JURISDICTION TO RELIEVE AGAINST JUDGMENT to which complainant failed to make a legal defense when he might have done so.

APPEAL from Union circuit. The opinion states the facts.

Harlan, for the appellant.

Morehead and Brown, for the appellee.

By Court, SIMPSON, J. Casey leased to Gregory a tract of land for the term of five years, from the first day of January, 1840, for which Gregory was to pay an annual rent of one hundred and fifty dollars. The rent for the years 1840 and 1841 was paid, and also one hundred and six dollars and twenty-five cents on account of the rent of 1842.

In the year 1842, four executions against Casey, which were in the hands of the sheriff, were, by his directions, levied upon the land leased to Gregory, and a sale thereof was made by the the sheriff, at which sale a man by the name of Buckham became the purchaser, at the price of twenty-one dollars. The sheriff then levied the executions upon the same land, and

subsequently sold the owner's equity of redemption therein—the land at the first sale having sold for less than two thirds of its value—and Gregory, the tenant, became the purchaser thereof, at the price of nine hundred dollars. He obtained the sheriff's deed for the land so purchased by him in the year 1844, having paid to the purchaser at the first sale the sum bid by him, with interest.

In the year 1845, after the expiration of the term, Casey brought an action at law upon the lease against Gregory, and recovered a judgment for seven hundred and fifty dollars, being the rent for five years, and entered a credit thereon for the rent which had been paid by Gregory.

This suit in chancery was then brought by the latter to enjoin the judgment at law, upon the ground that he was entitled to the rents which accrued subsequent to his purchase at the sale made by the sheriff in October, 1842.

The relief claimed by him was resisted by Casey upon various grounds. He contended that the first sale made by the sheriff was void, because it was made on the third instead of the first day of the court, and for other irregularities in the conduct of the officer who made the sale; that the purchase was, by operation of law, made subject to the lease, and therefore he was still entitled to the rents, notwithstanding the sheriff's sale; that the purchase by his tenant was for his benefit, because the relation that existed between them precluded him from denying his landlord's title, and he therefore held the title to the land as his trustee, and was bound by the stipulations in the lease to surrender to him the possession of the premises.

He also stated that he had made preparations, and intended to redeem the land, as he had the right to do, but the clerk of the court and his deputy had both misinformed him in relation to the time when the year would expire, and acting upon their information, he had failed to redeem the land within the time prescribed by law. As he had lost the right to redeem, as he alleged, by an accidental and unintentional mistake of the clerk, and not from any laches or negligence on his part, he prayed that he might still be permitted to redeem the land.

The objections made to the sheriff's sale were for irregularities that did not, if they existed, render the sale void, nor affect the right of the purchaser, with the exception of that one which was made to the time of sale. It was decided in the case of *Chambers v. Hays*, 6 B. Mon. 115, that a sheriff has no authority to sell on any other day of the court but the first. As the sale in this

case was made on the third day of the court, it was unauthorized, unless it was made by the consent of the parties. It appears that Casey on the day of the sale assisted in selecting the persons who valued the land, and was no doubt present at the sale, and made no objection to its taking place at that time. From these circumstances his consent must be implied, and he is estopped from questioning the validity of the sale.

The written lease for five years was valid without its being recorded, and the lessee had a right to hold the premises during his term, notwithstanding the sheriff's sale, but the purchaser had a right to the rents subsequently accruing, it being a well-settled principle of law that when an alienation of the reversion takes place, either by the act of the landlord, or by operation of force of law, the rent that subsequently accrues, as a general rule, belongs to the purchaser.

Although it is a general rule that a tenant shall not dispute his landlord's title, or do any act inconsistent with the relation that exists between them, yet he may show that the landlord's title has expired, and that he has himself become the owner of the land, either by a voluntary alienation on the part of the landlord, or by a coercive sale under execution. There is no reason why a tenant should be prohibited from purchasing at a sheriff's sale of the leased premises. It is no more prejudicial to the landlord that he should purchase than that the purchase should be made by some other individual.

As the purchaser of the leased premises, and having obtained the sheriff's deed therefor, the tenant was entitled to the rents that accrued after his purchase, or at least after the time of redemption had expired.

The landlord has not made out any equitable right to redeem the land purchased by his tenant. It was his duty to have ascertained and known the time in which the redemption had to be made; he knew the time of the sale, and must be presumed to have known when the year expired, in which he could have legally exercised the right to redeem. But if he was mistaken as to the actual time, the purchaser had no agency in producing the mistake, and his rights can not be affected by it.

Notwithstanding that the complainant's purchase was valid, he has not however made out any grounds for the interposition of a court of equity in his favor. The matters he relies upon constituted a good legal defense, and are exclusively cognizable in a court of law. He had paid the rents which had accrued previous to the sheriff's sale, and so far as he was himself en-

titled to the subsequent rents, as he had obtained the sheriff's deed before the suit at law was commenced, there was nothing to have prevented him from showing on the trial at law that they belonged to him, and his landlord was not entitled to recover them. We have not deemed it necessary to decide whether the purchaser was entitled to the rents from the time of the sheriff's sale, or only from the time that the right of redemption expired. If he were entitled to the rents during the year allowed by law for redemption, his defense was complete at law, and if he were not entitled to them, he has no defense against their payment, either at law or in equity.

Inasmuch, therefore, as a court of chancery has no jurisdiction in the case, the decree of the court below, perpetuating the complainant's injunction, was erroneous.

Wherefore said decree is reversed, and cause remanded, with directions to dissolve the complainant's injunction and dismiss his bill.

MERE IRREGULARITIES OR OMISSIONS OF SHERIFF do not vitiate a sale of property made by him. So a failure to advertise land more than twenty days, when the statute requires twenty-one, was held not to invalidate the sale: *Maddox v. Sullivan*, 44 Am. Dec. 234; *Swiggart v. Harber*, 39 Id. 418, and note. Such irregularities at most render the sale voidable, and can only be taken advantage of in a direct proceeding: *Swiggart v. Harber*, *supra*; *Reed v. Austin's Heirs*, 45 Id. 336, and note; and then only by the owner of the property and those claiming under him: *Hollowell v. Skinner*, 40 Id. 431.

RENT ACCOMPANIES REVERSION, unless separated by express reservation. So where rent is payable out of grain raised, if the landlord sells the land, the rent in grain becomes payable to the purchaser: *Johnson v. Smith*, 24 Am. Dec. 339, and note; and a conveyance of the fee to the lessee extinguishes the rent for the remainder of the term, where the conveyance is silent as to the rent: *Martin v. Searchy*, 20 Id. 64; *Moore v. Turpin*, 40 Id. 589. So where the owner of leased premises mortgages the same, the mortgage transfers the reversion, to which is incident the rent: *Burden v. Thayer*, 37 Id. 117, and note.

TENANT MAY ACQUIRE HIS LESSOR'S TITLE BY PURCHASE ON EXECUTION against the lessor, or by redeeming the premises after an execution sale, as a judgment creditor of the lessor, and may set up his title in bar to an action for rent subsequently accruing: *Nellis v. Lathrop*, 34 Am. Dec. 285, and note.

EQUITY WILL NOT RELIEVE AGAINST JUDGMENT that has been rendered possibly by neglect, as by failure to make the proper defense at law: *Callaway v. Alexander*, 31 Am. Dec. 640, and note. See also *Piggott v. Addicks*, *ante*, p. 547.

THE PRINCIPAL CASE IS CITED to the point that a sale of land by a sheriff on any other day than that fixed by law renders the sale void, in *Wile v. Sweeney*, 2 Duv. 161.

PRATHER v. CITY OF LEXINGTON.

[13 B. MONROE, 559.]

MUNICIPALITY IS NOT LIABLE to a person whose property has been injured by a mob within its limits.

DECLARATION WHICH CHARGES MUNICIPALITY WITH NOTICE through its officers should show when, how, and to what officers the notice was given.

OFFICERS OF CITY ARE QUASI CIVIL OFFICERS OF GOVERNMENT. They are personally liable for their malfeasance or non-feasance in office, but for neither is the corporation liable.

ACTION for damages for injury caused by a mob. The opinion states the facts.

Robertson and Woolley, for the plaintiff.

Robinson and Johnson, for the defendants.

By Court, SIMPSON, J. This was an action on the case brought by Matilda Prather against the city of Lexington, for an injury she sustained in the partial destruction of a dwelling-house belonging to her, and situated within the city, by the violence of a mob.

She alleged in her declaration that a mob, consisting of a large assemblage of persons wholly unknown to her, collected in and about her dwelling-house, and with force and violence injured and defaced the doors, windows, floors, and various other parts of the building to such an extent as to render it entirely uninhabitable; and that the city of Lexington, by and through her mayor and other officers, neglected, failed, and refused to call in requisition the law, in order to protect her property from the violence of the mob, and willfully and wantonly neglected and refused to suppress it, although apprised of its existence and its unlawful conduct in the destruction of her property. A demurrer to the declaration having been sustained, and a judgment rendered against her by the court below, she has prosecuted a writ of error to reverse the judgment.

The act to incorporate the city of Lexington vests in the mayor and city council the fiscal, prudential, and municipal concerns of the city. It authorizes them to pass all needful by-laws for its government, to appoint a city marshal, and to employ as many watchmen as they may in their discretion deem necessary for its safety and advantage. It constitutes the mayor of the city the chief executive officer of the corporation, and makes it his duty to be vigilant and active at all times in caus-

ing the laws and ordinances of the city to be duly executed and put in force. And it makes the watchmen conservators of the peace, and vests them with power to apprehend all felons, rioters, breakers or disturbers of the peace, and all persons of riotous and disorderly conduct, and to carry them before the mayor or some justice of the peace, to be dealt with according to law. These are all the provisions of the act that have any bearing upon the question of the liability of the city for the injury sustained by the plaintiff; there is nothing contained in the act expressly subjecting the city to a responsibility for the depredations of mobs, or making it liable for the official conduct of its officers.

The action, it will be perceived, is not brought against any of the city officers to hold them responsible for an injury sustained by the plaintiff in consequence of a failure upon their part to discharge a duty legally incumbent upon them; but it is brought against the city, in its corporate capacity, to hold it responsible for the supposed misconduct of its officers.

Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule, a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable, it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate: *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157]. It has also been held that cities are responsible to the same extent and in the same manner as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit: *Ross v. City of Madison*, 1 Ind. 281 [48 Am. Dec. 361]; *Mayor of Memphis v. Lasser*, 9 Humph. 757. And where a city corporation is bound to keep the streets and sewers of the city in proper repair, it is liable to damages if any person be injured by its neglect to have such repairs made: *Mayor etc. of N. Y. v. Furze*, 3 Hill (N. Y.), 612; *Mayor of Lynn v. Turner*, 1 Cowp. 86.

Still the question in this case is not whether the city in its corporate capacity is liable for an act done under its express authority, or for its own omission of a duty that is direct and absolute, and due from it as a corporation, such as the repairing

of its streets, sewers, etc.; but whether, although there is no provision in its charter subjecting it to liability for the acts of a mob, it is rendered liable therefor by the failure of its officers to suppress it.

We know of no principle of law that subjects a municipal corporation to a responsibility for the safety of the property within its territorial limits; nor has any case been cited in which such a principle has been recognized or established. If such a liability exist, what is its nature and extent? Does it afford protection against the acts of the incendiary and the midnight depredator, or only against the violence of a lawless mob? If against the latter only, and not against the acts of the others, whence arises the distinction? All the acts may be alike injurious, and if the corporation must secure the property of its members, in all events, against all unlawful violence, there is no room for discrimination, but a similar liability would exist in each of the cases mentioned. There is nothing in the nature or design of a municipal corporation that imposes such a duty upon it. The chief purpose of such an institution is the adoption of such measures of police as will promote the comfort, convenience, and general welfare of the inhabitants within the city, and by local laws adapted to the condition of a dense population, to impart efficiency to the local government.

It is not contended, however, as we understand the argument, that the city is answerable for injuries to property which could not have been prevented by her officers, if they had discharged their duty, but the proposition contended for is, that she is responsible, in her corporate capacity, where an injury to property has occurred that might have been prevented by her officers, if they had faithfully exercised the powers with which the law has invested them. On the other hand, it is contended that the duty of the city was fulfilled and the law complied with on her part when she appointed a marshal and a competent number of watchmen, according to the charter, and passed the needful by-laws for punishing and suppressing breaches of the peace and disorderly conduct; and that a failure by the officers to do their duty does not devolve any liability upon the corporation.

If the city be liable in her corporate capacity for the outrage committed by the mob which occasioned the injury to the plaintiff's property, it can only be upon the ground that the existence and lawless intention of the mob were known to the mayor or marshal of the city, and that they neglected or refused to use any means or to make any efforts to prevent the perpetra-

tion of the unlawful act which could have been prevented by them. The plaintiff's declaration fails to allege that the existence of the mob and its intention were known to either of these officers, or that any application was made to them for their assistance on the occasion; but merely alleges that the city of Lexington, by and through her officers, failed and refused to suppress the mob, "although well knowing of the same." The allegation appears to be that the existence of the mob was known to the city, but how or in what manner she had this knowledge is not stated; but if it is to be understood, as an allegation, that she had this notice through the medium of her officers, then it should have been shown how and when, and to which of the officers the notice was given. The declaration, therefore, is in this respect defective, even if the liability contended for rests on the city.

But we place the decision of the question arising upon the demurrer to the plaintiff's declaration upon broader ground. The officers of a city are *quasi* civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or non-feasance in office, but for neither is the corporation responsible. Omissions of a duty imposed upon them by law, productive of prejudice to an individual, is not a corporate injury. The duty of the officers of the city is prescribed by the statute from which also they derive their power. The corporation appoints them to office, but does not in that act sanction their official delinquencies, nor render itself liable for their official misconduct. The tenure of the office of mayor is fixed by the statute; he is commissioned by the governor of the commonwealth, and the corporation has no power to remove him. It would therefore be unreasonable that the city, in its corporate capacity, should be responsible for his omissions of duty. There are cases in which cities are made responsible for the depredations of mobs, by special legislation upon the subject. And in England local communities are made liable by statute to the party injured, in certain cases, for robberies and some other felonies committed within the hundred. But this liability is imposed for the purpose of having offenders against the law brought to justice, and only exists when the felon has not been apprehended. It is not created for the benefit of the party injured, nor imposed because the inhabitants of the hundred did not prevent the commission of the felony, but because they did not arrest the felon. And when an arrest is made, they are not liable for the injury. But no case has been cited,

nor are we apprised of any, in which it has been held that a municipal corporation is liable for the mere failure of its officers to discharge a duty which the law imposes upon them. Our conclusion, therefore, is that the present action can not be maintained against the city of Lexington; and this conclusion is sanctioned by the authority of the case of *Martin v. Mayor etc. of Brooklyn*, 1 Hill (N. Y.), 545, in which the same doctrine was established.

Wherefore the judgment is affirmed.

LIABILITY OF MUNICIPAL CORPORATIONS FOR PROPERTY DESTROYED BY MOBS.—Public or municipal corporations are under no common-law liability to pay for property of individuals destroyed by mobs or riotous assemblages: *Dillon on Mun. Corp.*, sec. 670; 4 *Wait's Act. & Def.* 645; *Western College v. Cleveland*, 12 Ohio St. 375; *Ward v. Louisville*, 16 B. Mon. 184; *Mayor of Baltimore v. Poultney*, 25 Md. 107. See also *Boylard v. Mayor*, 1 Sandf. 27; *Levy v. Mayor*, Id. 467.

The laws incorporating municipalities generally provide that it shall be their duty to regulate the police of the city, preserve the peace, prevent disturbances and disorderly assemblages, etc., or make similar provisions. The courts generally hold that this duty is that properly appertaining to an administrative and legislative body, namely, the making regulations by laws and ordinances for the purposes specified, to be enforced by the appointment of officers, and that neither upon general principles nor from the effect of such enactments is a city responsible for the destruction of property by a riotous assemblage, or for the neglect of the officers in not preserving the peace, and preventing such destruction: See authorities, *supra*.

This rule, that a municipality is not liable for the negligence or non-feasance of its officers or agents, is forcibly maintained in *Ogg v. City of Lansing*, 35 Iowa, 495; *How v. New Orleans*, 12 La. Ann. 481.

But acts of the legislature making such municipalities liable for damages caused by mobs are constitutional: *Darlington v. New York*, 31 N. Y. 164; *Davidson v. Mayor of New York*, 27 How. Pr. 342; *In re Pennsylvania Hall*, 5 Pa. St. 204; *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. 270; and a number of the state legislatures have thought it politic to so enact: See Statutes of California, 1867-8, p. 418; Laws of New York, 1855, c. 428; Laws of New Hampshire, 1854, c. 1519; Laws of Pennsylvania, May 31, 1841; Laws of Kentucky, Gen. Stat., c. 1, sec. 5; Laws of Kansas, sec. 1, c. 32, Gen. Stat. 390; Laws of Louisiana, March 9, 1855; Laws of Maryland, art. 82, Code Gen. Laws, sec. 2; Laws of Alabama, December 28, 1863; and perhaps other states. See also the English statute of 7 & 8 Geo. IV., c. 31, sec. 2.

A number of cases have arisen and been decided wherein those statutes have been construed, and as such statutes are very similar in their provisions, a citation of those cases, and a brief reference to the construction placed upon them, is not out of place in this note: See *Fauvia v. New Orleans*, 20 La. Ann. 410; *Duffy v. Baltimore*, Taney's Dec. 200; *Williams v. New Orleans*, 23 La. Ann. 507; *Hagerstown v. Dechert*, 32 Md. 369; *Underhill v. Manchester*, 45 N. H. 214; *Chailbourne v. New Castle*, 48 Id. 196; *Palmer v. City of Concord*, Id. 211; *Ely v. Supervisors*, 36 N. Y. 297; *Dale Co. v. Gunters*, 46 Ala. 118; *Newberry v. New York*, 1 Sweeny, 369; *Bank of Cal. v. Shaber*, 55 Cal.

322; *Wing Chung v. Los Angeles*, 47 Id. 531; *Blodgett v. Syracuse*, 36 Barb. 566; *Moody v. Board of Supervisors*, 46 Id. 659; *Atchison v. Twine*, 14 Kan. 350; *Fortunich v. New Orleans*, 14 La. Ann. 115.

In actions under those statutes, it is not necessary to allege that the damage or injury did not occur through the carelessness or negligence of the plaintiff: *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. 270.

Under a statute which provides that the party shall not recover if the affray was caused by his improper or illegal conduct, the keeper of a saloon and gambling-house can not recover for damages caused by an affray which arose in his establishment, in a dispute over a gambling wager: *Underhill v. Manchester*, 45 N. H. 214; but keeping a house of ill fame, or a rendezvous for thieves, robbers, or murderers, is not such an act of "carelessness or negligence" as will exempt the city from liability; such a place might be a nuisance, but it should be abated without destroying the property: *Ely v. Board of Supervisors*, 36 N. Y. 297; *Blodgett v. Syracuse*, 36 Barb. 527; *Moody v. Supervisors*, 46 Id. 659. The "improper" conduct referred to in those statutes as inciting the mob to commit the damage or injury complained of is such conduct as a man of ordinary care and prudence would not under the circumstances have been guilty of: *Chadbourn v. New Castle*, 48 N. H. 196; and the danger is "caused" by the owner's illegal or improper conduct, when without such conduct on his part the destruction would not have occurred: *Palmer v. Concord*, Id. 211.

The property owner is excused from giving the notice to the officers of the city, required by the statute, that the mob is about to assemble or to destroy his property, when he has no knowledge of the fact himself, or when he has not sufficient time, or is prevented by the mob from doing so, or if the officers have such knowledge themselves from other sources. *Alleghany Co. v. Gibson*, 90 Pa. St. 397; S. C., 35 Am. Rep. 670; *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297; *Newberry v. New York*, 1 Sweeny, 369; *Moody v. Supervisors of Niagara*, 46 Barb. 659; so the city is equally liable, whether the goods were destroyed or whether they were carried away: *Scarles v. Mayor of New York*, 47 Id. 447; *Solomon v. City of Kingston*, 24 Hun, 562; or whether the property is owned by a resident of the town or by an absentee: *Williams v. New Orleans*, 23 La. Ann. 507.

Claims under those acts do not have to be presented to the board of county commissioners or supervisors, but suit can be commenced upon them directly: *Dale Co. v. Gunter*, 46 Ala. 118; *Clear Lake Co. v. Lake Co.*, 45 Cal. 90; *Bank of Cal. v. Shaber*, 55 Id. 322.

The declarations and conduct of the officers of the town are admissible in evidence to show want of reasonable diligence, indifference, and sympathy with the mob on their part: *Hagerstown v. Dechert*, 32 Md. 370; and the city can introduce evidence that the plaintiff at the time his goods were destroyed exposed them for sale in a public market at an hour when a city ordinance provided that the market should be closed; but this evidence is not a complete bar to the action: *Fortunich v. New Orleans*, 14 La. Ann. 115.

CASES
IN-THE
SUPREME COURT
OF
LOUISIANA.

HASSAM v. ST. LOUIS PERPETUAL INS. CO.

[7 LOUISIANA ANNUAL, 11.]

WHERE SHIP, DISABLED BY STRESS OF WEATHER, puts into an intermediate port, and from her necessities part of the cargo is sold at a loss, its whole amount is not general average, but only such proportion as the general average charges bear to the whole amount disbursed.

MASTER HAS NO AUTHORITY TO SELL ANY PART OF CARGO, when voyage is broken up at an intermediate port, to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages.

APPEAL from third district court of New Orleans. The facts are stated in the opinion.

C. Roselius and John Claiborne, for the plaintiff.

Hunton and Bradford, for the defendants.

By Court, SLIDELL, J. This case was submitted in the court below, upon the following agreed statement of facts:

“The brig Hardy sailed from New Orleans on or about the first of October, 1849, on a voyage to San Francisco; her cargo consisting principally of lumber and merchandise. Insurances on the freight and cargo of the vessel were effected in the various offices; that with the defendants being ten thousand six hundred and sixty-six dollars on freight, and five thousand dollars on cargo, making a total on both risks of fifteen thousand six hundred and sixty-six dollars. While prosecuting her voyage, and when about latitude thirty-eight degrees and forty-two minutes south, and longitude fifty degrees and seventeen minutes west, the vessel encountered such tempestuous weather,

and was thereby so disabled, that it was found necessary to bear away for the nearest accessible port for repairs. On the first day of February, 1850, the ship was accordingly put away for Montevideo, where she arrived on the tenth day of that month. Upon surveys and examinations, it was found that she was much strained in her seams, leaking badly, and her rudder-post twisted, so as to render recalking necessary, and also a new rudder, in order to make the vessel fit to proceed on her voyage. In order to pay for the repairs and necessary expenses of the ship during her stay at the port of distress, and after having unsuccessfully attempted to raise funds by draft upon bottomry bond upon the owners, the captain was forced to sell a portion of the cargo. The value of the cargo so sold, estimated at the San Francisco prices, was seven thousand nine hundred and fifty dollars; from which, deducting necessary and usual charges, there remained (Montevideo currency) six thousand three hundred and forty-two dollars and eighty-four cents, the value at Montevideo.

“It is admitted that the vessel could not have completed her voyage without the repairs; that the cargo would have been almost sacrificed by a sale at Montevideo; that no means of transshipping the cargo to its port of destination presented themselves, and that it was impossible for the master to raise the necessary amount for expenses and repairs, in any other manner than by the forced sale of a portion of the cargo.

“The vessel, freight, and cargo were the property of H. H. Raymond, agent, $\frac{8}{38}$; Joseph Curtis, agent, $\frac{8}{38}$; Thomas Hassam, $\frac{6}{38}$; William H. Simmons, $\frac{4}{38}$; John Meggett, $\frac{4}{38}$; Thomas M. Meggett, $\frac{4}{38}$; W. C. Auld, $\frac{2}{38}$; J. Guard, $\frac{2}{38}$.

“The premium note for six hundred and forty-seven dollars and fifty-nine cents is admitted to be yet due defendants on account of the policy, with the interest thereon.

“Two adjustments of average have been made by adjusters at the request of the parties; that marked ‘A,’ made by R. Brennan, representing the views of the plaintiffs, and that marked ‘B,’ made by A. Brother, those of the defendants. Both are submitted herewith to the court.

“It is well understood that the real plaintiffs in this suit, and for whose use it is prosecuted, were the owners not only of the ship, but the cargo and freight.”

By reference to the adjustments above referred to, it further appears that the money produced by the sale of the goods at Montevideo was one thousand six hundred and seven dollars

and sixteen cents, exhibiting a loss on the goods by the forced sale of upwards of six thousand dollars; that this money was disbursed, partly for purposes which the defendants admit come under general average, to wit, port charges, pilotage, discharging cargo, provisions and wages of crew during deviation, reloading, surveys, protests, etc.; and partly in paying the bills for repairs of the vessel, and partly for purposes of the owners of the vessel. The vessel was uninsured.

It is contended by the plaintiffs that the whole amount of the loss sustained by the sale of the goods should be brought into general average; while the defendants say that the measure of liability, by way of general average, is such proportion of that loss as the general average charges bear to the whole amount disbursed. The latter theory prevailed in the court below.

We have looked with some care into the decided cases and the treatises on the subject of general average, a branch of the commercial law which is unhappily perplexed by discordant rules and subtle distinctions. The result of our examination is that the rule of apportionment claimed by the defendants is the correct one.

It would seem, according to Emerigon, that under the Roman law, from which the modern doctrine of general average is derived, if a ship found herself incapacitated by *vis major* to continue her navigation, and put into a port in order to effect repairs, neither the expenses of the repairs nor of the stay entered into general average. It may be questioned whether the case cited in the digest sustains his assertion as to the expenses of the stay; but it is clear to the point that the cost of the repairs was not so chargeable: See Meredith's Emerigon, 4, 81.

But even if the ancient doctrine was as stated by Emerigon, it has been in modern times enlarged; and although there is much variance in the custom of commercial nations and the views of legislators and jurists, yet most of them harmonize to this extent, that they allow some portion of the expenses thus incurred, upon the ground that putting into port in order to repair is a measure voluntarily taken for the general preservation.

In England and the United States it is fully settled, by numerous decisions, that where it becomes necessary to enter an intermediate port because the vessel, in consequence of a particular damage sustained, is unfit to prosecute her voyage; as when masts, sails, or other requisite apparel are lost in a storm, or the vessel has sprung a dangerous leak, the expenses of enter-

ing the port are a subject of general average, being considered as the consequence of a measure voluntarily taken for the preservation of the whole. In carrying out this doctrine, however, into practical details, the American and English decisions are in some respects conflicting, as in the case of wages and provisions of the crew during the delay for the purpose of repairs, which in England follow the expenses of the repairs themselves, while in the principal commercial states of this Union they are allowed as general average.

But with regard to the expenses of the repairs themselves, the case is different. These are not like the expenses of putting into the port of distress, the consequences of an extraordinary step taken for the general benefit. They are the consequences, not of the putting in to refit, but of the injury which the ship has sustained by the violence of the winds and waves, which loss her owners are themselves to bear, and not the owners of the cargo. The cost of such repairs is a charge imposed upon the ship by the contract of affreightment, whereby the captain and owners are bound to maintain her in a fit state for transporting the cargo to its place of destination. Of this duty the shipper has the right to demand the fulfillment, without contributing to the expense. Nor is it any answer to say that the repair of the ship is for the advantage of the shipper, because it tends to forward the voyage. It must also be remembered, that while the duty of repairing is incumbent upon the ship owner, by virtue of the contract of affreightment, he has, on the other hand, the benefit of the merchant's obligation to wait a reasonable time for the repairs at the intermediate port, or pay full freight. It is not, therefore, without reason that Mr. Stevens, in treating of the repairs done to a ship in a foreign port, where she puts in in distress, in order to enable her to complete her voyage, expresses his surprise that any discussion should have taken place on the subject of their exclusion from general average, or that there could ever have been any doubt that the owner of the ship was bound to keep his ship in repair. The idea, he observes, could only have originated in the supposition that what was eventually for the general good, that is in this case the arrival of the ship with her cargo, should be borne by a general contribution: See Stevens on Average, 42; Benecke on Indemnity, 193; 2 Arnould on Marine Insurance, 906, 907; *Padelford v. Boardman*, 4 Mass. 551.

Of course, in these remarks, we are limiting ourselves to the case where the damage to the ship was incurred by the violence

of the winds and waves; for it seems to be generally recognized, and to be consistent with reason and principle, that if a vessel necessarily goes into an intermediate port, in consequence of an injury, which is itself the subject of general average, as, for example, masts cut away, such repairs as are necessary to repair that injury are to be considered as general average.

Having thus considered the general doctrine touching the expenses of going into port of distress and the expenses of the repairs, it is necessary now to consider the consequences of a sale of goods effected at the port of distress, in order to defray such expenses.

It is an indisputable doctrine in commercial law, that in cases of absolute necessity, when the master, being in a foreign port, has no other means whatsoever of raising money to defray indispensable expenses incurred for the necessities of the ship, he may sell part of the cargo for the purpose of procuring funds. The right has been correctly said to be sanctioned by the earliest and most recent codes of maritime law, and by the jurisprudence of our own country.

When a loss is incurred by a sale thus made, that is to say, when the goods have been sold below the rate which, making the usual allowances, they would have produced at the port of destination, on whom is this loss to fall? •

In order that this question may be answered consistently with the principles already stated, it seems to us indispensable to consider the respective purposes for which the funds thus raised were necessary. And when that is ascertained, the equitable and true rule seems to us to be, that so much of the expense of raising the funds, namely, in this case the loss upon the goods sold, as is proportionate to the sum actually necessary for those purposes which were proper subjects of general average should be admitted in the account of general average; and that, on the other hand, so much of that expense or loss as is proportionate to the sums necessary for purposes of particular average should be borne by the particular interest. "It is a gross abuse," says Mr. Benecke, "when, as is sometimes done, the whole charges for obtaining funds, such as marine interest, etc., are passed to the general average account, although a part of those funds have been employed for a particular average on the vessel, or for the restitution of other partial damages. This also applies to commissions of agents and attorneys, surveyor's fees, brokerage, postage, and other similar charges. So much," he observes, "of the charge of procuring funds as corresponds with the sum

actually employed for the purposes of general average, and no more, can be admitted:" Benecke on Indemnity, 244, London ed. of 1824.

In a subsequent chapter of the same work, wherein he treats particularly of money raised abroad for the purposes of the voyage, and its relation to average, he remarks: "If the sale of goods be effected for reasons which constitute a general average, it can not be doubted that a general contribution must take place, whether the ship and cargo reach their destination or be lost. If the cause of sale be a mixed one, that part will be made good by general average contribution, which was applied to disbursements of that kind, and the owners will be personally liable for the remainder:" Benecke on Indemnity, 273.

Mr. Arnould, in his admirable treatise on the law of marine insurance, adopting the views of Mr. Benecke, states, that in his opinion the law of England on this subject is, that where goods are sold by the captain, in order to obtain funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the ship owner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale gives a claim to general average contribution: 2 Arnould on Marine Insurance, 893.

It is true, Mr. Kent, in treating of the subject of general average, remarks: "If part of the cargo be sold for the necessities of the ship, it is in the nature of a compulsive loan for the benefit of all concerned, and bears a resemblance to the case of jettison; and if the ship be afterwards lost, the goods saved must contribute towards the loss of the goods sold, equally as if they had been thrown overboard to lighten the vessel. In such a case, a portion of the cargo, according to Lord Stowell, is abraded for the general benefit:" 3 Kent's Com. 241.

In this general enunciation, that eminent author does not designate the nature of the necessities, to meet which the sale effected will draw with it as a consequence the right of a contribution from goods saved; and, moreover, he supposes the subsequent loss of the vessel.

In view of the qualified terms in which Mr. Kent speaks of

the right of contribution in the case of goods sold, it would be dangerous to carry the doctrine thus enunciated beyond the case put by that author; and this restricted interpretation of it seems the more proper, when we recur to the authorities which he cites in support of his opinion, and upon which we may reasonably infer it was based. These authorities, as will be seen by the note to the passage in question, are Hall's *Emerigon on Maritime Loans*, p. 94, and the *Case of the Gratitude*, 3 Rob. (La.) 364, upon which celebrated case great stress was laid by the plaintiff's counsel.

In *Emerigon's* work, *loco citato*, it is said: "It is a question whether the goods saved ought to contribute to the payment of those which have been previously sold. I believe that they must; and I derive my opinion from the rule which is established respecting goods thrown overboard to lighten the vessel, of which I have spoken in my treatise on assurance. For it is immaterial whether the goods be cast away or sold for the common benefit. I admit, that if the ship arrives in port, the owners are obliged to pay the value of the goods sold in the course of the voyage for the necessities of the ship, without power, excepting the case of right to institute the action of gross average. But if the vessel be lost, and part of the cargo be saved, the action of gross average is the only means of establishing an equality among the freighters, and regulating the contributions of the parties respectively."

In the *Case of the Gratitude*, the counsel for the petitioners, the lenders on bottomry and hypothecation of ship, freight, and cargo, admitted in argument that the cargo could not be called upon to pay what was expended in repairs of the vessel until the proceeds of ship and freight were exhausted, and they quote the opinion of *Emerigon*: "Si au lieu de prendre des derniers à la grosse, le capitaine avait vendu pour cause legitime, une partie des marchandises du bord, et que au retour du voyage le navire et le fret (aggravés par des engagements posterieurs et par les salaires de l'équipage) fussent insuffisans pour rembourser le prix des dites marchandises, cette partie devrait être supportée au sol la livre par les autres marchandises." And again: "Celui dont les effets sont vendus, pendant le voyage, pour les nécessités de la navigation, n'a pu ni s'y opposer ni se procurer aucune ressource particulière contre la personne du capitaine. Il es donc juste qu'en cas d'insuffisance du navire et du fret abandonnés par les propriétaires, la perte soit réglée sur l'universalité des chargeurs dont la condition doit être égale."

In his celebrated opinion in that case, Sir William Scott clearly intimates a recognition of that doctrine, for he lays stress on the fact that the master had at the time of hypothecation, when he compulsorily assented to the exaction of the security of the ship, freight, and cargo by the lender, reasonable ground to hope that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond without calling on the cargo; and he also lays stress on the fact that the bond having been put in suit, and the ship sold, her proceeds were insufficient to discharge the bond. The prayer of the petitioners was for a monition against the bail given to answer the action in respect to the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship.

Thus it appears, at most, from these authorities that the primary obligation to meet the loss of goods necessarily sold for the purpose of paying for repairs rests upon the ship, and resort by contribution is not to be had to the owners of cargo saved, unless the ship be lost, or the proceeds of the sale be first exhausted, so that such relief is indispensable to put the owner of the goods sold on an equal footing with the other shippers: See also *Pope v. Nickerson*, 3 Story, 500.

It is obvious that the present case does not fall within the doctrine enunciated by Mr. Kent. For here the vessel arrived at her port of destination safe, and unincumbered by subsequent engagements.

It was argued, on the part of the plaintiffs, that although the general rule is, that the owner must keep the vessel in a seaworthy condition at his own charge, the present case should be considered an exception, because the repairs, which ought, say they, to be considered as only benefiting the ship to the amount of the sum paid for them at Montevideo, really cost three or four times that amount, by reason of the loss incurred in the sale of the goods to raise the money. The whole loss on the goods, they contend, should be considered as incurred for the benefit of all the interests, according to the doctrine announced by Lord Ellenborough, in *Plummer v. Wildman*, 3 Mau. & Sel. 486, in which case he said: "If the return to the port was necessary to the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or to that accident, to the violence of the elements, or

the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting the voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore, it seems reasonable that all should contribute towards the expenses of it; but if any benefit, *ultra* the mere removal of this incapacity, should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship owner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expenses of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to the enabling the ship, with her cargo, to prosecute the voyage, and for so much, and no more, the defendant will be liable to contribute. As for the charge for the captain's expenses during the unloading, repairing, and reloading, the ship owner must bear the captain's expenses in port, and primage must be disallowed; it does not come under general average."

The plaintiff's counsel also refer to what is said by Mr. Kent in his chapter on general average: "If the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred, with safety to the ship, to a less costly port, such extra expense is general average."

It may well be questioned whether the expensiveness of the repairs has any control over the question of general average. Mr. Benecke, to whom Mr. Kent himself refers for a more minute detail of the principles applicable to general average, 3 Kent's Com. 242, and whose treatise he commends for its great research, clear analysis, and accurate application of principles, declares expressly that the expenses of repairing damage accidentally sustained by the vessel must fall upon the owners, however they may exceed what the same repairs might have cost in another port: *Id.* 194. Moreover, although the repairs in the present case were quite expensive, by reason of the loss incurred in raising money to pay for them, it is clear they could not have been deferred, with safety to the ship, to another port. The vessel could not have completed her voyage without the repairs; nor can we say that the expense of the repairs would not have been incurred but for the benefit of the cargo. Without the

repairs, the ship was unnavigable; but in her sound condition, after repairs, her value was seven thousand dollars, which is much more than their cost. So that, in point of fact, as we infer from the evidence, it was the interest of the owners to spend what was virtually spent in repairing her, with reference merely to the ship herself.

As to the case of *Plummer v. Wildman*, *supra*, we are unable to assent to the doctrine of Lord Ellenborough, touching the expense of repairs. It is very difficult to reconcile his remarks in that case with what he said in the subsequent case of *Power v. Whitmore*, 4 Mau. & Sel. 141. Mr. Arnould and Mr. Benecke both disapprove the doctrine announced in the former case, and consider it as overruled by *Power v. Whitmore*, Benecke, 197; 2 Arnould on Marine Insurance, 908.

It was expressly adjudged in *Power v. Whitmore* that the repairs of the ship, which had been compelled for the safety of the ship and cargo to put into a port in order to repair a damage occasioned by a tempest, were not a subject of general average.

Mr. Phillips also very distinctly intimates his dissatisfaction with the doctrine in *Plummer v. Wildman*, and with a case in Massachusetts, *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, which was decided according to what was considered to be the ruling in that case. After the fullest consideration which we have been able to give to this cause, and to the very interesting and important branch of commercial law which it involves, we are unable to see how, consistently with those general principles which regulate the contract of affreightment and the subject of general average, the expense of these repairs, which were rendered necessary by particular average loss, and which were indispensable for the ship's own safety, and to render her seaworthy in the further prosecution of the voyage which she had undertaken to perform, can give a claim to general average.

It appears to us that the reasons stated by one of the adjusters are not sufficient to exclude entirely any charge for commission for collecting and settling the general charges. It would seem reasonable, however, that they should not be as high as in ordinary cases, where the owners of ship and cargo are different, for the amount of trouble incurred is not the same. There is no evidence of the usage on the subject in a case like the present; the amount involved is small, and as the parties have not furnished the necessary evidence to enable us to close the matter, we do not think the judgment should be opened on that account,

which would throw the costs on the appellees, and also involve the expense of a new trial.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed; the cost of the appeal to be paid by the appellants.

LIABILITY OF SHIPPERS FOR AVERAGE AND CONTRIBUTION.—The elements of general average are a purpose, a means, and a result, a design to avert a common danger by a sacrifice voluntarily made, and a successful issue: *Nimick v. Holmes*, 25 Pa. St. 366. Liability for general average is not a risk; it is an obligation incident to a sacrifice to avert a risk: *Hunter v. Gen. Ins. Co.*, 11 La. Ann. 139. Average can not be claimed for the loss of property unless it was deliberately sacrificed for the preservation of the whole property in peril: *Nickerson v. Tyson*, 8 Mass. 467. In the adjustment of a general average at the home port, where there is no invoice, the value contained in the bill of lading is to be taken to be the value of the cargo as between the shipper and ship owner: *Tudor v. Macomber*, 14 Pick. 34. When a vessel or its cargo, during impending danger, is in part voluntarily sacrificed, or there is a voluntary expenditure of money or performance of service, for the preservation of the rest, the loss or expense must be borne by all the parties in interest in proportion to their respective interests: *Meeker v. Klemm*, 11 La. Ann. 104; *Lyon v. Alword*, 18 Conn. 66; *The Packet*, 3 Mass. 255. General average when not included in partial loss on policy: See *Reynolds v. Ocean Ins. Co.*, 33 Am. Dec. 727; *Gray v. Waln*, 7 Id. 642, and notes.

POWER OF MASTER TO SELL CARGO OF DISABLED SHIP AT INTERMEDIATE PORT.—Master of a ship, having no consignment of the cargo, has no right to pledge or sell any part of the cargo at an intermediate port short of the port of destination, except for necessary repairs and expenses to enable him to perform the voyage. If he break up the voyage at an intermediate port, he has no authority to sell any part of the cargo to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages: *Watt v. Potter*, 2 Mass. 77; *Stillman v. Hurd*, 10 Tex. 109; *Pope v. Nickerson*, 3 Story, 465. Master's power to sell is limited to cases of extreme necessity, and where he can not consult the owners or underwriters, from their distance, or the pressing imminence of the danger: *Peck v. Nashville Co.*, 6 La. Ann. 148; *Graham v. Underwood*, 15 Id. 402; *Winn v. Columbian Ins. Co.*, 12 Pick. 279; *American Ins. Co. v. Coster*, 3 Paige, 323; *Butler v. Murray*, 30 N. Y. 88. See also *Rugely v. Sun Ins. Co.*, *post*, p. 603. This subject will be found treated at considerable length in notes to *Williams v. Merle*, 25 Am. Dec. 616; *Newhall v. Dunlap*, 31 Id. 45; *Saltus v. Everett*, 32 Id. 541; *Myers v. Baymore*, 49 Id. 586.

BELL v. BOUNEY.

[7 LOUISIANA ANNUAL, 170.]

PARTY WHO VIOLATES PROVISIONS OF PATENT LAW by making and selling a patented article can not maintain an action to recover the purchase price thereof.

PURCHASER OF PATENTED ARTICLE, KNOWING THAT VENDOR HAD NO RIGHT either to manufacture or sell the same, can not recover from the vendor the money paid.

APPEAL from the fifth district court of New Orleans. The facts are stated in the opinion.

Race and Foster, for the plaintiff.

L. Castera, for the defendant.

By Court, PRESTON, J. In August, 1847, the plaintiff made and sold to the defendant a machine for making biscuit, for five hundred and ten dollars, of which he paid two hundred and fifty dollars. He sues for the balance.

It is proved sufficiently that it was a machine for which a patent in favor of John and Charles Bruce was renewed by a resolution of congress, approved the twenty-second of February, 1847.

The defendant denies her liability for the claim, and also, by reconvention, claims the two hundred and fifty dollars paid by her to the plaintiff, and also three hundred and fifty dollars paid by her to the assignee of the patentees, for the right to use the machine.

The last sum, it is evident, she can not recover. She paid the proper person for the use of a right belonging to him. But the plaintiff has entirely failed to show that he had a right to make and sell the machine called for by Bruce's patent.

Now we consider the acts of congress, giving treble damages as a penalty for violating another's patent, as penal laws, and the act an offense. No one can acquire a right by the commission of an offense.

It appears that the plaintiff has compromised with the assignee of the patentee for the damages, but that does not legalize his act or give him any right against the defendant.

The counsel of the plaintiff contends that he only made and sold the machine, not the right of using it. To give force to the distinction, he should have shown that the defendant knew of the patent at the time, and agreed to buy the machine without the right of using it.

The act of congress passed in 1800 prohibits the making as well as using or selling the thing, whereof the exclusive right is secured to another; so that the making and selling the machine alone, without the right of using it, was an unlawful act, for which the plaintiff can recover nothing.

We are of opinion that the defendant, from her vocation,

knew, or should have known, that she had no right to buy and use the machine without the consent of the patentee or his assigns, and that she can not recover back money paid to the plaintiff for an unlawful purpose.

It is decreed that the judgment of the district court be reversed, and that there be judgment for the defendant against the plaintiff's claim, with costs. It is further ordered and decreed, that there be judgment for the plaintiff against the demand of the defendant in reconvention, with the costs of the same, and that the appellee pay the cost of this appeal.

ACTION TO ENFORCE UNLAWFUL CONTRACT CAN NOT BE MAINTAINED. A contract, the consideration of which relates to the perpetration of a fraud, or contemplates the performance of an act prohibited by law, is unlawful, and can not be enforced: *Gravier's Curator v. Carraby*, 36 Am. Dec. 608. Contracts in violation of law or against public policy can not be enforced: *Spurgeon v. McElwain*, 27 Id. 266; *Boyd v. Barclay*, 34 Id. 765; *O'Donnell v. Sweeney*, 39 Id. 336, and notes referring to other cases in this series.

MONEY PAID UNDER ILLEGAL CONTRACT CAN NOT BE RECOVERED: *Boyd v. Barclay*, 34 Am. Dec. 765; *Webb v. Fulchire*, 40 Id. 419, and notes.

RUGELY v. SUN MUTUAL INSURANCE CO.

[7 LOUISIANA ANNUAL, 279.]

PRESUMPTION OF UNSEAWORTHINESS ARISES when a vessel springs aleak soon after the risk commences, without any apparent cause, from perils within the policy.

MASTER HAS NO LEGAL RIGHT TO SELL CARGO OF SHIPWRECKED VESSEL, where cargo is in condition to reship, and the means of transportation can be procured.

ASSURED CAN RECOVER PARTIAL LOSS OF CARGO disposed of by master, by reason of shipwreck, when the same could be reshipped or forwarded to its destination.

MASTER JUSTIFIED IN SELLING CARGO OF SHIPWRECKED VESSEL is bound to give such notice as will warn parties of the time and manner of sale.

APPEAL from the fifth district court of New Orleans. The facts are stated in the opinion.

Roselius, Benjamin, and Micou, for the plaintiffs.

J. A. Maybin, for the defendant.

By Court, SLIDELL, J. The plaintiffs sue for seven thousand five hundred dollars, the value of one hundred and twenty-five bales of cotton, insured by the defendants under a valued policy on a voyage from Matagorda, in Texas, to New Orleans. The

schooner *Velasco*, in which they were shipped, left Matagorda bay on the twenty-fourth of June, 1851, returned to the bay on the 26th in a sinking condition, and, for the purpose of saving the cargo, was beached. The persons who assisted in bringing her in made a claim for salvage, which was submitted by the captain to arbitration. A survey was called, and a sale of the cotton recommended. It took place on the third of July. The net proceeds, after deducting, among other items, thirty-three and one third per cent. salvage, allowed by the arbitrators, amounted to one thousand one hundred and seventy-seven dollars and fifty-five cents. The purchaser of one hundred and twenty-two bales reshipped them to the plaintiffs in another vessel, which arrived in New Orleans on the twenty-first of July, 1851. The gross proceeds at New Orleans were three thousand five hundred and ninety-five dollars and seventy-one cents, and net proceeds three thousand one hundred and fifty-one dollars and thirty-two cents. In the latter part of July, the plaintiffs applied to the defendants for payment of a total loss. The agent of the defendants replied, in writing, that he had examined the papers submitted to him, that the sale of the cotton and other proceedings were irregular and illegal, and that the claim was consequently not recognized. On the sixth of August, 1851, the plaintiffs, by letter, made an abandonment.

In their answer, the defendants resist the claim, on the ground of the unseaworthiness of the vessel, and also on the ground that the sale was illegal, and in violation of the terms of the policy.

Upon the latter ground, the district judge gave judgment in favor of the defendants, and the plaintiffs appealed.

Our attention will be first directed to the question of seaworthiness. The evidence upon that matter lies within a narrow compass, and consists of the protest, the testimony of the captain, taken under commission, and the testimony of Captain Swain, an inspector for New Orleans underwriters.

The material part of the protest, which is signed by the captain, mate, and two seamen, is as follows: "That the said schooner being tight, stanch, and strong, and having a full cargo of merchandise on board, in the port of Matagorda, bound for New Orleans, they, on Monday, the twenty-third day of June, 1851, having everything ready and fully prepared for sea at five o'clock, A. M., of said day, hove up the anchor, proceeded on their intended voyage, and stood down the bay with pleasant weather, and wind from the N. N. W.; that at ten o'clock, A. M.,

of said day, it became calm, and they came to anchor; at one o'clock, p. m., of said day, the wind having sprung up, they hove up the anchor, and proceeded down the bay; at five o'clock, p. m., they took aboard a pilot to carry them over the swash, and at seven o'clock, p. m., came to anchor off Ducrow's point. Tuesday, the twenty-fourth of June, at five o'clock, a. m., hove up the anchor and made all sail, with a fresh breeze from the N. W., and proceeded down the bay to the bar; tried the pumps and found no water; at six o'clock, a. m., took a bar-pilot on board, and at eight o'clock, a. m., after crossing the bar, discharged the pilot, and proceeded on their intended voyage, with the wind from the E. N. E., making their course towards the S. E. with pleasant weather; at twelve o'clock, m., hove ship, and stood in shore for land; at six o'clock, p. m., being close in land, hove about and stretched off, with the wind from the N. E. Sounded the pumps and found no water, and continued on their course until midnight, when they tacked ship, the wind having canted more to the eastward, and increasing; tried the pumps and found no water.

"Wednesday, June 25, 1851. At one o'clock, p. m., found the vessel would not steer as she ought to do; tried the pumps and found they would not suck; went forward and found the water over the forecastle deck; called all hands immediately on deck to the pumps, which were kept constantly going, and endeavored to make land, the wind increasing towards the eastward, and the water increasing so fast that they found that they were in a sinking condition."

At daylight, went aloft to look out for land. Saw a steamship running down. Made a signal of distress, but no notice taken; the vessel at this time being water-logged, and impossible to steer; the wind still increasing, blowing very heavy, and the atmosphere very thick. At nine o'clock, a. m., made the breakers on the bar, with the signal of distress flying; no pilot appeared; followed the breakers down, looking out for the pass; the sea breaking very high. At length found a place where they thought they would go over, not being certain whether it was the pass or not; saw a pilot-boat inside, but no appearance of any effort made to come to them, the sea all the time breaking fearfully over the bar, and concluded that they could not come to their assistance. Finding no alternative, as the vessel was making water fast, with two men at the helm, and the remainder of the crew assisting steering with her sails, managed to get her through the breakers, in the eastward or old

channel, without touching, the vessel leaking fast, with all hands at the pumps. After crossing the bar, the vessel unmanageable, with the union-jack down, and all their available power at the pumps to keep her from sinking, the pilot boat came off (the wind having increased to a gale); threw a line on board the pilot-boat, for the purpose of towing them on shore; but, the gale still increasing, the rope parted, and the vessel making water faster, though the pumps were constantly kept going. Kept their signal of distress flying, and at half-past nine o'clock Captain Thomas Ducrow came off from St. Joseph's island in a small boat, and tendered the services of himself and crew, to bring us into port. Finding themselves in a sinking condition, the water making fast, and the wind still increasing, they accepted his services to bring them into a safe place, where the vessel and cargo could be preserved; and about eleven o'clock, A. M., with much difficulty, got alongside of Ducrow's wharf, etc.

The captain, who was examined under commission by the plaintiffs, was asked by them whether he desired to make any explanations or corrections of what was stated in his protest. He answered that he had nothing to add; that it was correct. With regard to the condition of the ship, he stated that it was good before her departure; that she performed well on previous voyages; as well as any vessel he had been in; and that she was tight, staunch, and strong. On his cross-examination he stated that the vessel was about eight months old, built of white oak, and not coppered; that he saw her bottom last at New York; that she was tight when he boarded her at Matagorda; that she did not leak more on former voyages than vessels usually do; that he did not, when the leak was discovered, find out the cause of it, "but judged it was from distress of weather. After she was discharged, and pumped and bailed out, he found one leak between the mast, and in the center case."

Swain testified that he was inspector for several of the insurance offices, and well acquainted with the character and class of vessels. That from the facts detailed in the protest he considered the vessel unseaworthy at the time she sailed. He assigned as his reasons for that opinion, that the protest showed no bad weather from the time of her getting under way until they found her leaking so fast that they could not keep her free. He also stated that a vessel not coppered is liable to be worm-eaten.

Such is the substance of all the evidence before us upon the

question of seaworthiness; and the strong impression it has produced upon our minds is, that she was not seaworthy when she sailed.

When a ship becomes so leaky as to be unable to proceed on her voyage soon after sailing on it, and this can not be ascribed to stress of weather or accident on the voyage, the fair and natural presumption is, that it arose from causes existing before her setting out on her voyage; and consequently, that she was not seaworthy when she sailed. In such cases, therefore, it is incumbent on the assured to show that, at the time of her departure, she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. Such is substantially the rule, as stated by an able commentator, and it appears abundantly sustained by the authorities: See 1 Arnould on Marine Insurance, 686; 1 Phillips on Insurance, 324; *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474 [48 Am. Dec. 462]; *Talcot v. The Commercial Ins. Co.*, 2 Johns. 128 [3 Am. Dec. 406]; *Watson v. Clark*, 1 Dow, 344.

In *Talcot v. The Commercial Insurance Company*, *supra*, a vessel sailed with a fair wind and moderate weather, and in the evening of the following day suddenly sprung aleak, in consequence of which she foundered, without any apparent cause or extraordinary accident to which the leak could be ascribed. It was held that the loss was to be presumed to have arisen from her not being seaworthy at the time she sailed. A verdict of the jury in favor of the assured was set aside and a new trial granted.

In *Munro v. Vandam*, cited by Park on Insurance, 221, note, it was held that if a ship sail upon a voyage, and in a day or two becomes leaky and founders, or is obliged to return to port, without any storms or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed; and the jury, upon plaintiff's own case, may draw such a conclusion.

The question then is, whether the fair and reasonable presumption of unseaworthiness arising from the facts of the voyage, as exhibited by the protest, is counteracted and overthrown by the testimony of the master. And we are constrained to say that his testimony has not brought home such a reasonable conviction to our minds as would induce us to believe that some unknown accident or peril of the sea, and not the defectiveness of the vessel, was the cause of the leak. We can not concur with the learned counsel for the plaintiffs, in the opinion that

this case is as strong as that of *Snethen v. The Memphis Insurance Company, supra*. In that case, it is true, the cause of the accident was unexplained. But numerous witnesses testified in favor of the seaworthiness of the barge. The evidence came not merely from the officers and crew of the steamer that had the barge in tow, but from other reliable sources, such as two inspectors at her port of departure, etc. So that the court there characterized the evidence of seaworthiness as extremely full and cogent. And it should also be observed that the barge was navigating the Mississippi, where there is peculiar danger from snags, shoals, logs, and sand bars; that she was in tow of a steamer, and that, under all the circumstances, the chances of an external peril being encountered, without its occurrence being discovered at the moment, were much greater than in the case of a ship at sea.

We do not pretend to lay down any rule as to the extent and nature of the testimony that must be adduced in a case of this sort, to overthrow the reasonable presumption which the law raises; but the evidence should certainly be stronger than has been offered in this case. It is proper to add that in *Cort v. The Delaware Ins. Co.*, 2 Wash. 376, Mr. Justice Washington observed, that if a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, the circumstance may raise so strong a presumption of her having been unseaworthy at the time of her departure as to call upon the insured to give strong evidence to repel the presumption.

We feel a reluctance, however, to close the case upon this point against the plaintiffs, for two reasons: the district judge did not act upon it, so that we have not the benefit of his opinion as to the weight of evidence; and the plaintiffs may have been thrown off their guard, in the preparation of this branch of the litigation, by the fact that the underwriter originally made no objection on that score to the payment of the loss. We have thought it best, under all the circumstances, to leave the matter open for future inquiry.

The district judge, as we have already stated, decided the case against the plaintiffs on another ground, which we proceed to consider. The policy states that "in case of the loss of the vessel, or a part of the cargo, or of damage to the whole or part thereof, it shall be the duty of the master to forward such parts of the cargo as shall be saved in a fit condition to be shipped to its port of destination, by the best conveyance obtainable at

the place where the said goods may be, or at any other place within a reasonable distance, and the enhanced expense, not exceeding the amount insured, shall fall on the insurers."

From the evidence it appears that the cotton was in a fit condition to be shipped to New Orleans. The means of transportation to New Orleans could have been had within a reasonable time. There were means of consulting underwriters and others interested before selling, and no inexorable necessity that compelled an immediate sale. There was an inexcusable precipitancy, and, as we infer, an inexcusable want of publicity, in the time and manner of the sale. There was an inexcusable haste and looseness in the proceedings for arbitration as to the salvage. The recommendation of the surveyors that the cargo should be sold, the sale of the cargo, the agreement with the salvors to arbitrate the award, all bear date on the same day, the third of July, 1851.

In view of these facts, of the well-settled principles of law, and especially of the stipulation in the policy, we have no hesitation in concluding with the district judge that the sale was illegal, the abandonment inefficacious, and the claim for a total loss unfounded.

But we are not prepared to say with the court below that the plaintiffs are thereby precluded from any relief. If the vessel was unseaworthy, there is of course an absence of all claims for the loss against the defendants. But if she was seaworthy, we see no reason, as at present advised, for the entire discharge of the underwriters by reason of the failure to forward the cargo. The plaintiffs, it seems to us, would still be entitled to indemnity as for a partial loss.

It is therefore decreed that the judgment of the district court be affirmed, but without prejudice to the right of the plaintiffs to sue for a partial loss, the costs of the appeal to be paid by the plaintiffs.

PRESTON, J. In this case, I desire to express no opinion as to the law or evidence with regard to the seaworthiness of the vessel at the commencement of her voyage, but fully concur in the remainder of this opinion.

PRESUMPTION OF UNSEAWORTHINESS, WHEN IT WILL ARISE.—Vessel arriving at port in defective condition will be presumed to have been unseaworthy at the commencement of the voyage, unless adequate cause be shown to account for her defective condition: *Cameron v. Rich*, 53 Am. Dec. 670; *Dupeyre v. Western M. & F. Ins. Co.*, 38 Id. 218. Unseaworthiness will be presumed when a vessel springs a leak soon after the voyage commences, without

any apparent cause from perils within the policy of insurance. This latter presumption, however, may be rebutted: *Snetthen v. Memphis Ins. Co.*, 48 Id. 462, and notes referring to other cases in this series. See also *Rathbone v. Neal*, 50 Id. 579.

MASTER'S RIGHT TO DISPOSE OF CARGO: See *Hassam v. St. Louis Perpetual Ins. Co.*, ante, p. 591.

SHIPPER'S RIGHT TO RECOVER FOR PARTIAL LOSS: See *Hassam v. St. Louis Perpetual Ins. Co.*, ante, p. 591.

MENARD v. SCUDDER.

[7 LOUISIANA ANNUAL, 385.]

WRITTEN INSTRUMENT SHOULD BE SO CONSTRUED as to give it that effect which shall best accord with the intentions of the parties to the transaction.

MERCANTILE GUARANTIES SHOULD NOT BE SUBJECTED TO STANDARD OF CRITICAL NICETY applied to instruments drawn by professional men.

CONTINUING GUARANTY WILL BE IMPLIED from a letter in the following terms: "I do recommend my friend A. B., of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. C. D."

IN CONTINUING GUARANTY creditor must not only show that he advanced his money or parted with his goods on the faith of the letter of guaranty, but that he also seasonably notified the guarantor that he accepted the guaranty, and intended to act upon its security.

EXPRESS AND FORMAL NOTICE, EMANATING DIRECTLY FROM CREDITOR TO GUARANTOR, is not indispensable to bind the latter in continuing guaranty. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it will be sufficient.

DEATH OF GUARANTOR, WITHOUT NOTICE TO OR KNOWLEDGE BY CREDITOR, will not defeat the latter's indemnity for advances made in good faith after that event.

APPEAL from the district court of the parish of East Baton Rouge. The facts are stated in the opinion.

G. S. Lacy, and T. G. and P. H. Morgan, for the plaintiffs.

R. H. Marr, Cyrus Ratliff, and J. M. Elam, for the defendants.

By Court, SLIDELL, J. In this action the plaintiffs seek to recover from Scudder, and also from the succession of McCalop, by reason of a letter of guaranty signed by him, a sum of nineteen thousand eight hundred and sixty-four dollars and three and three fourths cents, being a balance, exhibited by an account annexed to the petition, arising from supplies furnished for the use of Scudder's plantation; moneys advanced and expended for him at his request, upon accommodation acceptances, accommodation in-

dorsements, orders, etc. There was a verdict for the plaintiffs against McCalop's estate for the sum of fifteen thousand seven hundred and thirty-eight dollars and three cents, and the executor has appealed.

The letter of guaranty, upon which the claim is made, is in these words: "Baton Rouge, December 4, 1849. I do recommend my friend, Mr. J. B. Scudder, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. James McCalop."

There is no doubt this instrument contains a proposed contract of guaranty. It is not a mere recommendation. With the recommendation is cumulated the declaration, "any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay." The common sense of this declaration is a promise to indemnify; a guaranty to those who might lend him money, or accept for him. The proposition that this instrument was a mere expression of a feeling of moral duty, and did not contemplate a legal obligation, is not worthy of serious consideration. As the letter was intended to hold out inducements to others to part with their money, and was calculated to create a just appreciation of indemnity, good faith requires that such expectations should be fulfilled; and a breach of good faith, in such case, to another's detriment, the law will not tolerate.

But a graver question is presented when we inquire what is the extent of the legal responsibility contemplated by the writer. Was it intended as a limited or as a continuing guaranty? Was it a guaranty intended to attach only to such aid, by way of loan or acceptance, as should be given to Scudder on the presentation of the letter? or was it intended to cover such transactions with him from time to time as the necessities of the one and the convenience of the other might dictate?

The solution of this question is not free from difficulty, and might perhaps be solved in either way, according as one might choose to adopt, in the extreme of the conflicting doctrines which are to be found in the adjudged cases. Some of the authorities advocate in favor of the surety a strict rule of construction, and seem to demand that it should appear unequivocally that it was the purpose of the guarantor to guarantee the payment of debts contracted from time to time: See *Melville v. Hayden*, 3 Barn. & Ald. 593, opinion of Best, J.; *Cremier v. Higginson*, 1 Mason, 336; *Whitney v. Groot*, 24 Wend. 84.

On the other hand, there are authorities which countenance

the doctrine that a large and liberal construction is to be given in such cases in favor of one claiming rights under such guaranty, and holding it to be the duty of the guarantor to limit his guaranty expressly to a single dealing, if he would avoid a further responsibility: See *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smee*, 6 Bing. 244; *Drummond v. Prestman*, 12 Wheat. 515; *Lawrence v. McCalmont*, 2 How. 450; *Lee v. Dick*, 10 Pet. 493. Opinion of Lord Ellenborough, cited in Smith's *Mercantile Law*, 386.

The true doctrine, we are inclined to believe, lies between these extreme opinions; and we think it was very judiciously observed by Dewey, J., in *Mussey v. Rayner*, 22 Pick. 223, that a safe rule of construction would be to give the instrument that effect which shall best accord with the intentions of the parties, as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor nor restricting them in aid of the surety: See also *Bell v. Bruen*, 1 How. 187.

In furtherance of this rule of construction, we would add, that for the nature and purpose of mercantile guaranties, and the circumstances under which they are usually prepared, it seems improper to subject them to the standard of critical nicety, which might with more reason be applied to instruments usually drawn by professional men. Mercantile guaranties are usually written by the guarantor himself, and are often brief in their language, and inartificial and loose in their form. And in such cases a nice and technical construction might rather confuse than aid the mind in its search for the true intentions of the writer. We should endeavor, if possible, to put ourselves in the condition of the parties, and so seek to ascertain from the words used what were the ideas which existed in the writer's mind, and which he desired to convey to the person or class of persons to whom the letter would probably be exhibited; and we should also consider what effect he ought reasonably to expect the words used would produce in the minds of such persons: See also Civil Code, arts. 1897, 1948.

Now, McCalop was a planter. His friend Scudder, whom he recommends, was a planter. He so describes him in the letter. He may be reasonably supposed as having, in his mind, the usual course of business and the usual wants of a planter; the usual mode in which persons in that vocation seek for pecuniary facilities, and in which merchants extend them. He desires

to facilitate Scudder in getting commercial aid, and he gives him the letter for that purpose. The words are adapted to the purpose: I recommend him. His business is that of a planter. As such he wants to raise money. He wants some one to aid him, by cash advances or accommodation acceptances. If any one will assist him in this way, I will pay them if he does not. He does not say, I will guarantee a single loan or a single acceptance; but he speaks in the plural: any funds he may raise, or acceptances.

Considering the business of the person whom he proposed to benefit, the nature of the business to be transacted, and the class of the community to whom it was reasonable to suppose the letter would be exhibited, we are led to the conclusion that a continuing guaranty was contemplated by McCalop, and that it would be so understood by a Louisiana merchant.

We have looked, with much care, into the decided cases, and find the prevailing doctrine to be, that, in the case of a prospective and continuing guaranty, the creditor must not only show that he advanced his money or parted with his goods on the faith of the letter of guaranty, but that he also seasonably notified the guarantor that he accepted his guaranty, and intended to act upon its security. As the subject is one of much commercial importance, it is proper to refer to some of the principal cases which bear upon it.

In *Russell v. Clark*, 7 Cranch, 69, it appeared that Clark and Nightingale, of Providence, had written to Russell letters, introducing and recommending their friends, Murray & Co. of New York, who had in contemplation purchases of merchandise in Charleston. Judge Marshall, in giving the opinion of the court, considered the letters as recommendatory merely, and not constituting a contract, by which Clark and Nightingale undertook to render themselves liable for the engagements of Murray & Co. to Russell; but, he observes, had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice of the extent of his engagements.

In *Cremer v. Higginson*, 1 Mason, 340, which was the case of a letter of credit, specially addressed, Story, J., held that it was clearly the duty of the plaintiff to notify the defendants that reliance was placed on the guaranty.

In *Edmonston v. Drake*, 5 Pet. 624, which was the case of a letter of credit, specially addressed, Chief Justice Marshall observed: "It would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish com-

mercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it.

In the case of *Douglass v. Reynolds*, 7 Pet. 117, Douglass and others had addressed a letter to Reynolds, Byrne & Co., in which they said their friend Huring, to assist him in business, might require R., B. & Co.'s aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash. And they bound themselves to be responsible to R., B. & Co., at any time, for a sum not exceeding eight thousand dollars. The court considered this a continuing guaranty, and held that it was necessary, to entitle R., B. & Co. to recover on the letter, that they should prove that notice had been given, in a reasonable time after the letter had been accepted by them, to the guarantors that it had been accepted.

In *Lee v. Dick*, 10 Pet. 492, the question of necessity of notice of acceptance of the guaranty arose under a letter addressed in Tennessee, by Lee, to N. & J. Dick & Co. of New Orleans, in which they said: "Nightingale & Dexter wish to draw on you at six or eight months' date. You will please accept their draft for two thousand dollars, and I do hereby guarantee the punctual payment of it." The court observed, the question is, whether the plaintiffs were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon this guaranty. It is to be observed that this guaranty was prospective; it looked to a draft thereafter to be drawn; and this question is put at rest by the decision of this court. They cited *Russell v. Clark*, 7 Cranch, 91, and *Edmonston v. v. Drake*, 5 Pet. 624.

So in *Adams v. Jones*, 12 Pet. 213, it was held, that upon a letter of guaranty addressed to a particular person, or persons generally, for a future credit to be given to the party in whose behalf the guaranty is drawn, notice is necessary to be given to the guarantor, that the person crediting has accepted or acted upon the faith of the guaranty. See also *Wildes v. Sarage*, 1 Story, 22; *Beekman v. Hale*, 17 Johns. 140; *Bank of Illinois v. Sloo and Byrne*, 16 La. 542 [35 Am. Dec. 223]; *Cremer v. Higginson*, 1 Mason, 340; *Mussey v. Rayner*, 22 Pick. 228; *Norton v. Eastman*, 4 Greenl. 521.

In citing the foregoing authorities, we do not wish to be understood as adopting them in their entire scope. Some of the rules which they enunciate have been in subsequent decisions

qualified or abandoned; but so far as they inculcate the necessity of notice of acceptance in a case like the present, to which case we desire to confine our opinion, we believe they have commanded a frequent concurrence in American courts, and we do not doubt their correctness. For where the letter of guaranty is addressed to the public at large, where it is prospective and to attach upon future transactions, where it is unlimited in amount and indefinite in duration, and is by its nature subject to recall, it seems manifestly just that the guarantor should be entitled to notice of acceptance, within a reasonable time, from the person who undertakes to act upon its faith. Such notice is material and important for many reasons. It enables the guarantor to know in whose favor the guaranty has attached or is about to attach; to form an idea of the probable nature and extent of his liability; to appreciate the necessity of vigilance on his own part; to avail himself, when necessary, of the appropriate means in law and equity; to protect himself with regard to liabilities which may have accrued; and to arrest their future creation by a recall.

We have not overlooked the fact that the late decisions in New York, see *Douglass v. Howland*, 24 Wend. 35; *Union Bank v. Coster*, 3 N. Y. 203 [53 Am. Dec. 280], conflict with this opinion, but we think the weight of authority and argument presented by the cases cited preponderates in its favor.

We come now to the inquiries whether McCalop had reasonable notice of acceptance of the guaranty by the plaintiffs. And upon this point we premise that express and formal notice, emanating directly from the creditor to the guarantor, is not indispensable. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it appears to us sufficient: *Civil Code*, 1805, 1812, etc.; *Train v. Jones*, 11 Vt. 444.

There is no express evidence of notice in the present case. It rests upon circumstantial evidence alone, and this branch of the cause is certainly not free from difficulty. It presents another instance of that looseness with which commercial business is conducted in this state—a looseness which is the fruitful parent of litigation, and a source of extreme embarrassment to our tribunals, who are often called upon to apply the principles of commercial law to transactions in which the actors have disregarded that method, exactness, and forecast which ought to distinguish commercial dealings.

It is contended by the plaintiffs that notice may be inferred

from the following circumstances, exhibited by the evidence, and which are thus stated and commented upon in the argument of their counsel:

“1. From the fact that Menard & Vignaud had previously been the merchants of Scudder, McCalop could well presume, from that circumstance, that Scudder had given the letter to his old factors.

“2. From the circumstance that M. & V. were the accommodation acceptors and indorsers of the joint paper of McCalop and Scudder, given for the benefit of the latter.

“3. From the connection and intimacy which existed between Scudder and McCalop. The testimony proves that Scudder had married a relative of McCalop; that the latter had gratuitously raised a heavy mortgage, which he held upon the property of the former, and that McCalop had placed in the possession of Scudder an unlimited letter of credit; and, with these facts standing prominently forth, can we for a moment presume that Scudder did not frankly and promptly inform his friend and benefactor, in whose hands he placed the letter of credit? At least, is not this a question of fact, properly submitted to the jury? And the jurors having, by their verdict, found in our favor upon that question, can this court feel authorized to reverse the finding upon that point?”

The facts thus generally stated are certainly quite cogent, and they do not lose their force by a more minute and detailed examination. For example, it appears that on the eighth of January, 1850, a few weeks posterior to the date of the letters of guaranty, Scudder drew, at Baton Rouge, two drafts to the order of and indorsed by McCalop, who was an accommodation indorser, at eleven and twelve months, for two thousand dollars and two thousand five hundred dollars, upon Menard & Vignaud, which were accepted by them a day or two afterwards, for the accommodation of Scudder, and being thus accepted, were put, by the acceptors, into the market in New Orleans, and discounted. The proceeds of discount were put to the credit of Scudder, in account current, on the eleventh of January, 1850, and they were paid at maturity to the holder by the acceptor. Tested by technical rules applied to the face of the instrument, and without the assistance of surrounding facts, this bill transaction would not aid the plaintiffs; but, considered with reference to the true relations of the parties to the bills, and the irregular but well-known course of dealing between our factors and planters, by which the factor raises money for the planter,

through his own accommodation acceptances of the planter's bills, these transactions become very significant, and can hardly be reconciled with any other hypothesis than that McCalop knew the purpose of the drafts, and that his guaranty had been or would be presently used to obtain for his friend the desired accommodation. Again, on the eighth of February we find Menard & Vignaud indorsing and getting discounted in the New Orleans market, for the accommodation of Scudder, his note, dated Baton Rouge, January 27, 1850, at twelve months, for four thousand five hundred dollars, indorsed by McCalop, which was taken up, after protest, by the plaintiffs. On the eighteenth of April, 1850, the plaintiffs again accepted a draft of Scudder, indorsed by McCalop, for five thousand dollars, at four months. Other circumstances of like character are shown by the record, but it is unnecessary to state them in detail.

Now, the letter on its face indicates that Scudder was in need of accommodation. It was a letter given to be used for that purpose, and as the subsequent acts of McCalop connect him so palpably with the efforts of Scudder to obtain accommodation from the plaintiffs, and the defendants have not shown any facts which could have tended to create an idea in McCalop's mind that the letter of the fourth of December had been used elsewhere, we are naturally led to the conclusion that he was well acquainted with the direction it had taken. The same circumstances, and the great intimacy between McCalop and Scudder, may account for the omission, on the part of the plaintiffs, to address him a formal letter of acceptance.

It is said the precise time when the letter came into the possession of the plaintiffs does not appear. It is undisputed that it was in their possession in the early part of April, 1850, after which period important advances were made; and the circumstances of the case point strongly to the inference that it was exhibited to them personally after its date. That inference was drawn by the jury, and the defendant asks with a bad grace for a reversal of the verdict on that score, having opposed and succeeded in excluding (erroneously, we think) testimony which would have given more precision to this matter.

Where a guaranty has been accepted, and the guarantor knows the facts, notice from time to time of the advances actually made appears in general to be unnecessary: See *Wildes v. Savage*, 1 Story, 33.

It is said that although McCalop died on the ninth of July, 1850, matters went on in the same way as before, until some

months after his death, when the account terminates; and that advances after his death should be stricken from the account, so far as McCalop's estate is concerned. Upon inspection of the account, we find there were some advances subsequent to the ninth of July on the one hand, and remittances on the other; and perhaps, upon a different showing, the subsequent remittances, there being no express appropriation at the time, might be applied, *quoad* the guarantor, to the antecedent indebtedness of Scudder, which would result in some reduction in the appellant's favor. But as the case stands, upon the evidence, we do not feel authorized to disturb the verdict.

A guaranty like the present, we understand, is countermandable by the guarantor so as to arrest his further liability after notice; and it may be that the death of the guarantor would operate a revocation after notice of the death, or knowledge of the fact brought home to the creditor. But so far as we may judge from the analogies of the law, the mere death, without notice or knowledge, ought not to defeat the creditor's indemnity for advances, made in good faith, after that event. See the article 3001 of the civil code as to acts done in good faith, by an agent, after the death of his principal. See also Troplong *Du Contrat de Société*, No. 903. "*Utilitatis porro reipublicæ maxime circa commerciorum libertatem versatur. Nihil autem est quod exercendis commerciis et propagandis tantopere prosit, quantum si publice et bonâ fide contrahentes sciant se certo contrahere:*" *Comm. de Favre*, l. 24, sec. 1, *D. de Minoribus*, cited by Troplong, note No. 903, *supra*.

The judgment of the district court is affirmed, with costs.

WRITTEN INSTRUMENT, HOW CONSTRUED.—Rules of construction of contracts at law are in general the same as in equity: *Robert v. Beatty*, 21 Am. Dec. 410. The intention of the parties must govern in the construction of a contract, if it can be collected from the instrument and the circumstances, and is not repugnant to some settled principle of law: *Roberts v. Beatty*, *supra*; *Kendall v. Russell*, 20 Id. 696; *Tindall v. Conover*, 40 Id. 220; *State v. Page*, Id. 608; *Stewart v. Preston*, 44 Id. 621; *Chapman v. Glassell*, 48 Id. 41. The intention of the parties must be ascertained from the whole context of the instrument: *Singleton v. Carroll*, 22 Id. 95; *Watson v. Blaine*, 14 Id. 669. In construing contracts, the situation of the parties and the subject of their transactions should be considered: *Wilson v. Troup*, Id. 458.

WRITTEN INSTRUMENT DRAWN BY NON-PROFESSIONAL MAN, HOW CONSTRUED.—Written contracts should be so construed as to give effect to them, rather than the contrary; and when they are informal, illiterate, and unskillfully drawn, the intent is to be ascertained, if possible, without regard to technical rules, by construing the words as they were understood by the parties, resort being had to every part of the instrument, and the intent,

when thus ascertained, is the governing rule in enforcing the contract: *Atwood v. Cobb*, 26 Am. Dec. 657. Strict rules of grammar will not control a writing made by men who are not grammarians: *Watson v. Blaine*, 14 Id. 669. The ordinary and legal meaning of the words used must be taken into consideration: *Workman v. Insurance Co.*, 22 Id. 141; *Collins v. Benbury*, 42 Id. 155.

CONTINUING GUARANTY DEFINED.—An instrument executed by parties whereby they bind themselves to a limited extent for any goods that might be sold to a party therein named will be construed as a guaranty limited to the specified sum on all sales of goods upon the credit of such guaranty: *Wilde v. Haycraft*, 2 Duv. 309. When the terms of a guaranty will admit of its continuance, the practical construction put upon it by all parties is the true one: *Michigan State Bank v. Peck*, 28 Vt. 200. A letter worded, "You can let D. have what goods he calls for, and I will see that the same are settled for," was held a continuing guaranty in *Hotchkiss v. Barnes*, 34 Conn. 27. For further instances of continuing guaranties, see *Rapelye v. Bailey*, 8 Am. Dec. 49; *Fellows v. Prentiss*, 45 Id. 484, and cases cited in the notes to the same.

GUARANTOR IS ENTITLED TO NOTICE OF ACCEPTANCE OF HIS GUARANTY: *Oaks v. Weller*, 37 Am. Dec. 583; *Fellows v. Prentiss*, 45 Id. 484. It is generally the duty of one who gives credit to another upon the faith of the guaranty to give notice to the guarantor of the credit given: *Dobbins v. Bradley*, 4 Cranch C. Ct. 298; *Burns v. Semmes*, Id. 702; *Lawson v. Townes*, 2 Ala. 373; *Fay v. Hall*, 25 Id. 704; *Cahuzac v. Samini*, 29 Id. 288; *Lane v. Levilian*, 4 Ark. 76; *Craft v. Johan*, 13 Conn. 28; *Taylor v. McClung*, 2 Houst. 24; *Bell v. Kellar*, 13 B. Mon. 381; *Norton v. Eastman*, 4 Me. 521; *Allen v. Pike*, 3 Cush. 238; *Hill v. Calvin*, 5 Miss. 231; *Smith v. Anthony*, 5 Mo. 504; *Taylor v. Wetmore*, 10 Ohio, 490.

GUARANTY, WHEN ABSOLUTE, NO FORMAL NOTICE REQUISITE.—In case of an absolute guaranty, the guarantor is not entitled to demand or notice of non-payment: *Dickerson v. Derrickson*, 39 Ill. 574; *Bowman v. Curd*, 2 Bush, 565; *Breed v. Hillhouse*, 7 Conn. 523; *Woolley v. Sergeant*, 14 Am. Dec. 419; *Oaks v. Weller*, 37 Id. 583; *Fellows v. Prentiss*, 45 Id. 484. Guarantor of a non-negotiable instrument is liable without demand or notice: *Woolley v. Sergeant*, 14 Id. 419. See also cases collected in note to *Gibbs v. Cannon*, 11 Id. 703.

MCDOWELL v. GENERAL MUTUAL INS. CO.

[7 LOUISIANA ANNUAL, 684.]

MASTER IS BOUND TO SECURE SERVICES OF PILOT when entering foreign port where pilots are employed, and must approach pilot ground with caution.

UNDERWRITERS' LIABILITY CEASES UPON FAILURE TO EMPLOY PILOT on part of owner or his agents, where a pilot's services are necessary to avoid danger.

UNDERWRITERS ARE NOT LIABLE FOR LOSS OF STRANDED VESSEL when the loss could have been avoided by care and diligence on part of owner or his agent.

WHEN VESSEL SEAWORTHY AT COMMENCEMENT OF VOYAGE becomes unseaworthy during the same, the owner is bound to repair the damage at the port of refuge, refreshment, or trade to entitle him to recover risk.

UNSEAWORTHINESS ARISING AFTER COMMENCEMENT OF VOYAGE shall not operate as a defense, except where the loss has been occasioned by it, and resulted from negligence or misconduct of the assured or his agent.

MASTER'S PROTEST IS ADMISSIBLE IN EVIDENCE to impeach testimony of master rendered after protest had been made.

APPEAL from the fourth district court of New Orleans. The facts are stated in the opinion.

Elmore and King, for the plaintiffs.

E. Briggs, for the defendants.

By Court, SLIDELL, J. This action is upon a policy of insurance for the value of goods shipped in the schooner *Maria*, on a voyage "from New Orleans to Brazos river and about twelve miles above Columbia." The vessel was wrecked in crossing the bar at the mouth of that river. The defendants resist the payment of the loss, on the ground that it was occasioned by the neglect of the master to employ a pilot in crossing the bar.

There was judgment for the plaintiff in the court below, and the defendants have appealed.

We consider it as satisfactorily resulting from the evidence, that it is customary for vessels of the description of the *Maria* to take a pilot in crossing the bar of the Brazos river; and the propriety of doing so is shown by the nature of the locality. It appears from the testimony that there is a shifting bar and channel, and that it would not be safe to cross without a pilot. The absence of a pilot under such circumstances must be considered as producing a positive and definite increase of risk.

It may be considered as well settled in American jurisprudence, that a master, in entering a foreign port where pilots are usually employed, is bound to approach the pilot ground with caution, and to use reasonable diligence to obtain a pilot. If he enters without a pilot, and the vessel grounds and is wrecked in doing so, the underwriters on ship are not answerable for the loss thereby sustained, unless it be shown that the reasonable diligence to obtain a pilot was unsuccessfully exerted, or that circumstances of impending danger rendered it unsafe to wait for a pilot, or that such other state of facts existed as would reasonably excuse the omission by showing its necessity: See *Bolton v. American Insurance Company*, cited in 3 Kent's Com. 176, note; 1 Phillips on Insurance, 315; *Keeler v. Fireman's In-*

insurance Company, 3 Hill (N. Y.), 250; 2 Greenl. Ev., sec. 400; *McMillan v. Union Insurance Company*, 1 Rice L. 248 [33 Am. Dec. 112]; cited in 3 Kent's Com. 176, note. See also *Id.* 289; *Patapsco Insurance Company v. Coulter*, 3 Pet. 235.

That the question of liability of underwriters, in case of the omission to take a pilot, is the same, whether insurance be on the ship or goods laden on board by third persons, seems clear. The subject of employing a pilot appears properly to fall under the head of seaworthiness, and is so treated by the commentators. Now, it is settled that the warranty of seaworthiness is equally implied, whatever may be the subject of insurance, and applies no less to insurances effected by the owner of goods than to those effected by the owners of the ship: See *Oliver v. Cowley*, cited in 1 Park on Insurance, 228 b, 306; Arnould on Marine Insurance, 654; 1 Phillips on Insurance, 308. See also *Taylor v. Lowell*, 3 Mass. 347 [3 Am. Dec. 141].

The owners of the goods are not without recourse. They have their remedy, for the consequences of the captain's neglect to take a pilot, against him and the owners of the ship.

It is proper here to remark, that although it seems to be the great leading principle of the English doctrine of seaworthiness, that there is no implied warranty of seaworthiness, except at the commencement of the voyage, yet the law in the principal commercial states of this Union is at variance with the English doctrine, and gives a wider extent to the implied warranty. It holds it to be the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if, from the neglect of the owner or his agents, the vessel becomes unseaworthy, by damage or loss in her hull or equipments, during the voyage, the owner must repair the damage or supply the loss, at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of diligence: 3 Kent's Com. 288, 289; Arnould on Marine Insurance, 666.

The American doctrine, however, is qualified to this extent: that unseaworthiness, arising after the commencement of the voyage, has not a retrospective operation, so as to destroy a just claim in respect of losses which have occurred prior to the breach of the implied warranty; and also, that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness shall not operate as a defense, except where the loss is distinctly shown to have been occasioned by it, and the unseaworthiness itself to have arisen from the negligence or misconduct of the assured or

his agents. The language of Mr. Kent, with regard to this latter qualification, is very apposite, by reason of the illustration it gives to the present controversy. "The owner," says he, "is bound to keep the vessel in a competent state of repair and equipment during the voyage, as far as it may be in his power. If this be not the case, and a loss afterwards happens, which could by any means be either increased or affected by a prior breach of the implied warranty of seaworthiness when the policy attached—as, for instance, if the master should omit to take a pilot at an intermediate port where he ought and might have done it, and the vessel be, two years afterwards, lost by capture; or if he sailed without sufficient anchors, and the vessel be afterwards struck with lightning—would the insurer be discharged? The better opinion would seem to be, that he would not be discharged:" 3 Kent's Com. 289. See also *Paddock v. Franklin Ins. Co.*, 11 Pick. 227.

Mr. Arnould advocates the English rule, and considers it decidedly preferable, both as giving the assured a more complete indemnity, and also preventing many nice and difficult inquiries, which, in his opinion, the other system has a direct tendency to produce. But it seems to us, on the other hand, that the American rule is more consistent with public policy, considered with reference to the preservation of life and property.

In the present case, the plaintiffs insist that the captain did all he could to procure the services of a pilot; and in support of this proposition, they rely on the testimony of the captain, which is as follows:

On Tuesday, thirtieth of April, 1850, at five o'clock, A. M., made Galveston island, bearing north-west. At ten o'clock, A. M., made the mouth of the Brazos river. The bar, to appearance, was smooth, and being abreast of it (the bar), hove the vessel to for a pilot, witness at the same time seeing the pilot-boat making for his schooner. The pilot-boat approached within hailing distance of the schooner, the schooner heading at that time to the south and west, the jib to windward and below her lee, and the pilot-boat was on the same tack, at the stern of the schooner, gaining on her, when the pilot-boat hailed the schooner and demanded if she wanted a pilot. Witness answered from the schooner, "Yes; what is the pilotage?" They hailed again from the pilot-boat, but witness could not hear distinctly what they said, but supposed it was to repeat the question, and witness returned the same answer. Whilst these questions were being propounded and answered, witness was standing by the lee

main rigging, and having a man heaving the lead and reporting four fathoms of water. The pilot then bore away before the wind, and went on the opposite tack; and, as it is customary on the bar of Texas for pilot-boats to go in first, and for vessels to follow, I bore away after the pilot-boat, and followed it for about half an hour; but not keeping up with the pilot-boat, I set my signal for him to wait; but he not waiting, and the schooner not getting any farther off from the shore on this tack, witness put the schooner about and stood on the opposite tack. By putting the schooner about she dropped astern, and was in three fathoms of water before she got headway; and whilst standing on this tack, she not being able to clear the south breakers, and her anchor and chains not being able to hold her, witness kept her away and attempted to cross the bar. This was the only alternative, either to cross the bar or drift on the north or south breakers. It was then about one o'clock, P. M., when the schooner got on the bar, and she commenced thumping; and, the wind being light and dying away, she lost her steerage way, and the current, running very strong out of the river, swept the schooner on the south-west point, etc.

In addition to this testimony, the plaintiff also offered the testimony of one of the seamen, which substantially accords with the captain's. These depositions were taken before a justice of the peace, after the answer was filed in the cause.

If the case stood upon this testimony alone, we might have concurred with the district judge in holding the defendants liable.

But a grave difficulty is presented by comparing the testimony of the captain and seaman, taken after the refusal of the underwriters to pay the loss on account of the omission to employ a pilot, with the protest made in Texas a few days after the wreck, and signed by them. This instrument relates with the usual detail of a log-book, from which it would seem to have been copied, the circumstances of the vessel's voyage from New Orleans to the coast of Texas, giving, day by day, the winds, soundings, weather, accidents occurring on board, etc. We then find the following statement: "Tuesday, thirtieth, at five o'clock, A. M., made Galveston island, bearing north-west; at ten A. M., made the mouth of the Brazos river, the bar to appearance was smooth, the wind fresh from the south-east; at one o'clock, P. M., bore away, and stood on to the bar; but while crossing it the wind died away, and before the anchors could be let go the current, which was then running six miles per hour, swept the

schooner onto the south-west point, where she commenced thumping on the bottom very heavy; immediately got out the boat, and carried out the anchor; and at ten p. m. succeeded in bearing the schooner to the inner point (she thumping heavily all the time, and leaking badly), when the hawser parted, and she was again swept on the south point; it now required both pumps to keep her free; the wind light from the south-east, and continued so until midnight. Wednesday, May 1st, at one a. m., the wind began to increase; at four, the wind still freshening; went on shore in the yawl and borrowed an anchor from the schooner McNeil, and got the pilot-boat and pilot's men to assist in taking out the anchor, and to assist in heaving her off; at five, returned to the schooner and found she could not be kept free with both pumps, and that she had settled in the sand; commenced heaving on the hawser, but found she did not move; at eight a. m. she had gained on the pumps two feet water, and at ten a. m. she settled down and soon filled to the deck, and became a total wreck; at which time H. C. Wilcox, wreck-master, came off with two launches and twenty-two men, and began to strip the vessel and take out the cargo; two men would go under the water and hook onto articles, and the rest hoisted them out and took them on shore. The vessel was all the time gradually sinking, the wind continued fresh, and very little progress could be made in getting out the cargo. Thursday, May 2d, the schooner had sunk so that the water was one foot on the deck; worked all this day, but owing to the high sea, got out but little cargo. Friday, May 3d, at daylight, went down to the wreck, found six feet water on the deck; we could get no more cargo out, and abandoned the vessel and cargo as it lay."

It will be observed that the protest is entirely silent as to any attempt whatever to get a pilot. No mention whatever is made of heaving to for a pilot, of speaking one, or even of having seen one, until many hours after the vessel had attempted to cross the bar, and was wrecked.

A protest is a very important and solemn instrument. We have indeed no law such as is contained in the celebrated *Ordonnance de la Marine* of France, in her existing *Code de Commerce*, in the *Codigo de Comercio* of Spain, and the legislation of some other commercial nations, commanding captains of vessels to make protests or consulates; yet it is a matter of commercial usage to make them. Although not receivable in our courts as evidence for the masters, his owners or shippers, credit is often given to their contents by merchants and underwriters.

Such an instrument usually is, as Mr. Abbott observes, and as every merchant and captain knows, a narrative by the master of the particulars of the voyage, of the storms encountered, the accidents which may have occurred, and the conduct which, in cases of emergency, he had thought proper to pursue. "He should take care," says Mr. Abbott, "to supply from the log-book his own recollections, and that of the mate or trustworthy mariners, true and faithful instructions for its preparation."

When, therefore, a captain, having met with a disaster, prepares and signs a protest, while the circumstances are fresh in his memory, setting forth the manner of its occurrence, and afterwards, when a litigation involving a charge of misconduct against himself has arisen, attempts, as a witness, to account for the disaster, by statements of material incidents of his voyage, undisclosed by the protest, his testimony must be viewed with great distrust, and can not be considered as satisfactorily verifying the circumstances of the loss.

In *Senat v. Porter*, 7 T. R. 158, it was held that the protest of the captain could be used to contradict his testimony.

Emerigon, who had not merely studied the law of insurance in books, but had a very large practical experience as an advocate and judge in the admiralty, says that a captain can not impeach his own work, and say that he has betrayed the truth, or that he has not exhibited in his consulate all the important facts of the case. And in another place he observes: "Every captain who, having the power of making his consulate in due form, fails to do so, renders his conduct very suspicious." He cites the forcible language of Casaregis: "Ex qua omissione actûs soliti, facilis, et necessarii, oritur suspicio et presumptio, quod pretensum damnum navis non acciderit ex dicta causa."

We must not be surprised, therefore, says Emerigon, at the judgments, which, having regard to the circumstances of fact, have rested on the want of a consulate, to decide the cause in favor of the insurers. He then cites a case, which presents, as regards the master's conduct, a very strong analogy to the one before us. A captain borrowed a sum on maritime loan, his voyage being for the coast of Italy, Naples, Corsica, and Sardinia. He went to Tunis, where he made no consulate, to show the necessity of his deviation. He there took on board a cargo of timber. He touched at Bastia, where he made a consulate, in which he said nothing as to the cause of his voyage to the Barbary coast. Having left Bastia, he was wrecked. Arrived at Marseilles, he made a consulate, by which he attested

that a storm had forced him to put into Tunis. The lenders objected, that the consulate should have been made at Tunis. The decree, in spite of the shipwreck, condemned the captain to pay the sum received on maritime loans, with the marine interest and land interest: See Meredith's *Emerigon*, 606 et seq.

Although in the tribunals of France the rules of evidence in matters of insurance differ from our own, and the doctrines thus enunciated by *Emerigon* must therefore be considered with proper qualifications, their spirit commends itself to our reason, and may be invoked here in the investigation of truth.

It is therefore decreed, that the judgment of the district court be reversed, and that there be judgment of nonsuit, the plaintiffs paying costs in both courts.

PRESTON, J., dissenting. The defense to this suit, on a policy of insurance on cargo, is that the loss claimed did not result from the perils insured against, but was caused by the willful neglect of the master to take a pilot on entering the Brazos river. This, it is contended on authority, rendered the vessel unseaworthy, and exonerated the underwriters.

The cause of the loss, as stated in the protest of the master and crew, evidently taken from the log-book, was that the vessel attempted to cross the bar of the Brazos river under sail, but while crossing it the wind died away, and before the anchor could be let go, the current, which was running six miles an hour, swept the schooner on the south-west point, where she commenced thumping; could not be got off, and sunk. The cargo, consisting of heavy machinery and brick, belonging to the plaintiffs, who were not owners of the vessel, was lost. The immediate cause of the loss was the dying away of the wind at the critical moment of crossing the bar, the rapidity of the current of the river over the bar forcing the vessel on a point where she thumped and sunk. These were perils of the sea insured against, and the loss must be borne by the insurers unless they can exonerate themselves from liability by the proof of facts having that effect. The burden is on them, and they undertake to show that though the proximate causes of the loss were perils insured against, yet these were traceable to neglect and misconduct of the master in not having a pilot where it was customary and necessary, thus rendering, in the language of books of authority, the vessel unseaworthy.

Now, the only two witnesses to the facts which actually occurred are the master and a seaman. Both state that the master

made all reasonable efforts to obtain a pilot, but without success. Their testimony in this respect is not in contradiction to the log-book and protest, but certainly makes additions to them, and is thereby to some extent impaired. Still the testimony is uncontradicted, while the defendants, by examining the pilots at the Brazos, could have entirely destroyed it if untrue. Being a question of fact, and with regard to which the district court gave full credence to the testimony of the witnesses, I think we should yield to his judgment as to the facts, and if so, to conclude that the loss was caused by *vis major*, the effect of force.

If we take it for granted that the log-book contains the whole of the facts, and that the master made no efforts to obtain a pilot, the case is still, in my judgment, on the meager testimony before us, against the defendants. It is true, three insurance officers of New Orleans have been examined in their behalf. Two were never at the Brazos, one has passed over the bar twice. They state that the bar is a shifting one, the channel changeable, that they do not consider it safe to attempt to cross without a pilot, and would not insure a vessel going to the port if it was understood that the captain was to be his own pilot. These are the opinions of witnesses who have no practical knowledge on the subject, for Mr. Wilder probably crossed the bar only as a passenger. They do not refer to the circumstances of this case. In it we are obliged to believe the master was a mariner by profession. It appears he was in command of a small schooner of fifty-five tons, which might have safely passed the bar, although a vessel of two hundred tons could not. The water on the bar was smooth and the wind fair. He was the owner of one fourth of his vessel, and it was uninsured. Under such circumstances he attempted to cross the bar himself. I can not doubt that he exercised ordinary prudence, and that in the best exercise of his judgment he believed that he could cross the bar with his small schooner without a pilot, or he would not have risked his own property rather than pay three or four dollars pilotage.

The defendants have offered no proof but the event, to show an entire want of judgment in the master. Success is undoubtedly the best criterion by which to test the judgment of men in everything, but it is not so invariably correct as to dispense with the proof of bad judgment in case of misfortune. For the want of ordinary care and prudence the master would, perhaps, have forfeited the insurance of his owners on the vessel. But, in my opinion, the shippers and insurers of cargo forfeit their insurance only by their own negligence, and not by negligence

on behalf of the master. Thus, the plaintiffs shipped and insured their property on a vessel which, it is not disputed, was seaworthy and properly manned when she sailed. It was a sufficient compliance with their warranty as to the master, that he possessed a general good character for care and skill in his profession. Perhaps, as insurers of cargo only, and in the very port where the insurance company was established, even an inquiry as to the general good character and capacity of the master is immaterial, because the insurers are bound to a knowledge on these subjects as well as the insured, and in fact take care, by officers, to obtain the same knowledge with the assured. As to the latter, he often ships his freight on the vessel by the master named, or whoever may go as master. The strict scrutiny of this subject is not required, as there is not the slightest impeachment of the general character or capacity of the master at the commencement of the voyage. And it is to be presumed to have been good until the contrary is shown by evidence. As, therefore, it is to be taken for granted, in this case, that the master possessed a general good character for care and capacity when the cargo was shipped, the shippers must be exonerated from negligence or want of prudence in shipping the cargo on board his vessel.

After the vessel sails, I do not think the insurers of a cargo liable to lose their insurance for the errors of judgment, mistakes, or even negligence of the master. The general rule laid down by elementary writers, as Phillips and even Chancellor Kent, that the failure to take on board a pilot where it is customary renders the vessel unseaworthy and avoids the policy, must be subject in practice to this distinction in favor of the insurers of cargo, who have no interest in the vessel, or it would be a most unreasonable rule.

Mr. Arnould states that it is the rule in England that the assured warrants the vessel as being seaworthy at the commencement, and not during the voyage; but that it is settled in the United States that she must be kept seaworthy during the voyage, and thinks the English rule most eligible. As far as I can judge, there is some diversity of decisions in both countries, growing out of the extremely varying circumstances of particular cases. And perhaps the real error consists in elementary writers classing together cases and things that are dissimilar, and attempting to subject them to a general rule.

Thus, the unseaworthiness of a vessel and the neglect to employ a pilot are two different things, and not necessarily sub-

ject to the same general rule as to their effect upon insurance. The neglect of the master to employ a pilot seems more assimilated to the neglect to set the proper sails, or to steer the right course, or to keep the necessary watch, or cast anchor when approaching breakers.

Now, for all losses, the proximate cause of which is one of the enumerated risks, although remotely caused by negligence or unskillfulness of this character, it has over and over again been decided in England that the underwriters are responsible. The maxim, *Causa proxima non remota spectatur*, invariably governs: *Busk v. The Royal Exchange Company*, 2 Barn. & Ald. 73; *Walker v. Maitland*, 5 Id. 173; *Bishop v. Pentland*, 7 Barn. & Cress. 219. And in this country the supreme court of the United States have fully adopted the same doctrine in three cases.

In the case of the *Patapsco Insurance Company v. Coulter*, 3 Pet. 222, I consider analogous in facts and principle to the case under consideration. The insurance was upon a cargo of flour, from Philadelphia to Gibraltar. The vessel was burnt by the negligence or carelessness of the master, in Gibraltar, and the cargo was lost. The supreme court of the United States, in so many terms, decided that the underwriters were not discharged, it being admitted that the loss of the flour was caused by the negligence or carelessness of the master: *Patapsco Insurance Company v. Coulter*, *supra*; *Columbia Insurance Company of Alexandria v. Laurence*, 10 Id. 507; *Waters v. Merchants' Louisville Insurance Company*, 11 Id. 213.

This last case was a river risk, upon a steamboat, but declared by the court to be assimilated to and governed by principles applicable to marine risks. The court, after an elaborate opinion, came to the conclusion that the policy covers a loss of the boat by fire, caused by the negligence, carelessness, or unskillfulness of the master and crew of the boat, or any of them, and that pleas to the effect that the fire by which the boat was lost was caused by the carelessness, neglect, or unskillful conduct of the master and crew of the boat, was not a defense to the action, by the owners on the policy, or sufficient in law to bar their recovery of the loss. The whole scope of the opinion goes as far as any English decision, and further than I should be willing to go, for in effect the owners of the boat were indemnified for a loss caused by their own agents, and consequently by themselves.

It is by no means necessary to go so far as the supreme court of the United States have gone in this case, to support the claim

of the assured in the case under consideration. They insured cargo not on their own vessel. It is alleged to have been lost by the neglect and carelessness, not of their agents, but of the master of a vessel which did not belong to them, and who was not under their control. His general character for care and skill is not attacked. At most, as has been seen, his general character is all that could be expected from the assured, or that he bound himself to warrant, and not all the particular acts of the master on consequences of his omissions.

The fact that barratry is generally excepted from the risks insured when the assured is an owner of the vessel, though not excepted when he is not an owner, shows by analogy that there should be a distinction between the liability of the insurer for the negligence or unskillfulness of the master as to the loss of the vessel and the loss of the cargo. As to the latter, it appears to me nothing but a general character at the shipping port for negligence and unskillfulness, and that unknown to the insurers should exonerate them.

There is another consideration in this case which is conclusive to my mind. By the very terms of the policy the plaintiffs are insured against the barratry of the master. Surely, since the parties by express contract agreed to insurance against the crimes of the master, they, by implied contract, intended insurance against his particular acts of negligence or unskillfulness. Such an implied agreement has been inferred from insurance against barratry in several decisions.

In the case of *Law v. Hollingsworth*, 7 T. R. 160, on which the defendants principally rely, it is probable the insured were owners of both ship and cargo, and if so, the master was agent of both. He violated a statute of George III., which expressly required that vessels should be navigated on the river Thames, under the direction of a competent pilot, because, as declared by the statute, the navigation was intricate and dangerous. No discretion was left to the master, and his employers were condemned to bear the consequences of his violation of law. So in the other case relied upon, of *Stanwood v. Rich*, cited in 1 Phillips on Insurance, secs. 701, 726, the insurance was on the vessel, and Chief Justice Parker left it to the jury to decide whether the failure of the master to take a pilot in the harbor of Boston was such negligence as would discharge the underwriters. He did not, indeed, put their discharge on the ground that he was the agent of the insured, and that therefore the principals must suffer for the negligence of their agent; but it appears to me this was

the true ground. I can see no more reason for discharging the underwriters from insurance on cargo on account of the negligence of the master than for discharging the insurance on the stock of a store on account of the negligence of the owner of the house which caused the fire and loss, and *vice versa*.

For these reasons I think the judgment of the district court should be affirmed.

Application for rehearing refused.

THE PRINCIPAL CASE WAS FOLLOWED in *Lapene v. Sun Mutual Ins. Co.*, 8 La. Ann. 1, to the points that a master neglecting to obtain the services of a pilot where one was necessary, rendered the vessel unseaworthy, and that the underwriters' liability ceased by his failure to provide or obtain a pilot.

WHEN ACTS OF ASSURED WILL VITIATE POLICY.—Insurance policy may protect against losses through mere negligence and carelessness, yet it will not protect against the misconduct of the party insured, and a loss resulting therefrom the owner of the property insured must bear: *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 386. If the assured unreasonably neglects and fails to keep the vessel seaworthy while the risk attaches, the insurer will not be liable for a loss occasioned thereby: *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Copeland v. New England Ins. Co.*, 2 Met. 432; *Caper v. Washington Ins. Co.*, 12 Cush. 517; *Jones v. Ins. Co.*, 2 Wall. jun. 278; *Miller v. Russell*, 1 Bay, 309.

PROTEST OF MASTER AS EVIDENCE, AND ITS ADMISSIBILITY to impeach subsequent testimony of master: See the following cases and notes, where the same is treated at length: *Miller v. S. C. Ins. Co.*, 13 Am. Dec. 734; *Fleming v. Marine Ins. Co.*, 38 Id. 745.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

HOBSON *v.* WATSON.

[34 MAINE, 20.]

ATTORNEY'S LIEN UPON JUDGMENT IN FAVOR OF CLIENT DOES NOT ACCRUE until the judgment is entered.

ATTORNEY NEED NOT GIVE NOTICE OF INTENTION TO RELY UPON HIS LIEN in order to retain it against the discharge of the judgment creditor under the Maine statute.

PAYMENT BY DEBTOR TO NOMINAL CREDITOR, NOT REAL CREDITOR, and known to be such, is not a performance of one of the conditions of a bond by payment of the debt, nor would the payment of the entire debt to a part owner have that effect, when there was knowledge of an equitable interest in another of a portion of it.

ATTORNEY'S LIEN UPON CLIENT'S JUDGMENT IS INTEREST TO SAME EXTENT as if the creditor had assigned it to him as collateral security for his fees and disbursements and he has such interest in all the legal incidents which attach to it.

ARREST OF JUDGMENT DEBTOR IS ONE MODE AUTHORIZED BY LAW for the collection of the debt.

BOND GIVEN UNDER STATUTE FOR RELEASE OF JUDGMENT DEBTOR from arrest is a substitute for the custody of the debtor, and is a legal incident attached to the judgment and execution.

ATTORNEY'S LIEN UPON CLIENT'S JUDGMENT FOR FEES AND DISBURSEMENTS attaches to bond given pursuant to statute to the creditor to release the debtor from arrest, and in a suit upon the bond the attorney may use the obligee's name.

CREDITOR CAN NOT DISCHARGE BOND GIVEN HIM UNDER STATUTE for the release of his judgment debtor so as to divest the attorney's lien thereon.

ATTORNEY'S LIEN WILL ATTACH TO JUDGMENT OBTAINED UPON BOND given by judgment debtor for release from arrest on execution.

DEBT by an attorney at law, against the principal and surety, upon a poor debtor's relief bond. The attorney had assisted

the judgment creditor in obtaining a judgment against the principal in the bond. Under execution issued on the judgment, the debtor had been taken into custody, and had obtained his release by the execution of this bond, pursuant to statute. Before the expiration of the time stipulated in the bond for the performance of its conditions, the judgment creditor was paid the amount of the judgment, interest, and disbursements, and he discharged the judgment and the bond. The attorney after this discharge commenced this action for the recovery of his fees and disbursements, which amounted to a little more than half the judgment, claiming a lien upon the bond, and bringing the action in the name of Hobson, who was the judgment creditor and obligee in the bond. The case was submitted to this court upon agreed facts.

L. De'M. Sweat, the attorney, *pro sese*.

McArthur, for the defendants.

By Court, WELLS, J. The statute, c. 117, sec. 37, recognizes the existence of a lien upon the judgment in favor of the attorney in the suit, for his fees and disbursements. It does not accrue until judgment is entered: *Potter v. Mayo*, 3 Greenl. 34 [14 Am. Dec. 211]. By the English rule, to perfect his lien the attorney must give notice to the defendant that he claims it: *Welsh v. Hole*, 1 Doug. 238; *Read v. Dupper*, 6 T. R. 361. But our statute does not require that the attorney should give notice of his intention to rely upon his lien, in order to retain it against the discharge of the creditor: *Gammon v. Chandler*, 30 Me. 152.

The statute creates the lien, without such notice of a design to enforce it. A knowledge of its existence is sufficient. It is not contended in this case, that the debtor was ignorant that an attorney was employed to prosecute the suit against him, or that he had not a valid lien upon the judgment, but that the surety on the bond had not such knowledge. But it does not appear that the surety has made any payment on the bond, and he is now fully informed of the claim of the attorney. A payment made by the debtor to the nominal creditor, when he was not the real creditor and not the owner of the debt, and known to be such, would not be a performance of one of the conditions of the bond, by a payment of the debt. Nor would the payment of the entire debt to a part owner have that effect, when there was knowledge of an equitable interest in another of a portion of it.

Does the lien extend to the bond in suit, and embrace it?

The attorney has an interest in the judgment, to the amount of more than half of it. What is the nature of that interest? It is a property in it to the extent of such interest, as much so as if the creditor had assigned it to him as collateral security, for his fees and disbursements. And it being the property of the attorney, he has all the legal incidents which attach to it, and which by law may arise from it. He could not claim a right to the benefit of any contract made between the creditor and debtor, in relation to the mode of satisfying the judgment, when it was voluntarily entered into by them, and not prescribed by law. But the debtor has the right, without the consent of the creditor, to give a bond to relieve himself from arrest on the execution. It does not depend upon the will of the creditor. It is a legal incident attached to the judgment and execution. The arrest is one mode authorized by law for the collection of the debt, and the bond is a substitute for the custody of the debtor. The creditor is compensated by the bond for the liberation of the debtor. The bond belongs to the owner of the judgment. If the whole amount due upon the judgment was costs upon which the attorney had a lien, would he not be entitled to the control of the bond? It would be his property in equity, and he would have a right to use the name of the nominal party in a suit upon it.

Nor is there any reason why he should be deprived of this right to the extent of his interest if his lien was upon less than the whole judgment. There would be a similar necessity for protection to him, when his interest is in a part, as in the whole judgment. Suppose the execution to be satisfied by a levy upon real estate, would not the attorney have an equitable interest in the land to the extent of his lien? Whoever owned a part of the judgment in equity would also own in equity an equal portion of the land, and a court of equity would compel a conveyance from the legal to the equitable owner. The attorney's lien resembles an assignment of a chose in action. In the case of *Martin v. Hawks*, 15 Johns. 405, the attorney, who had a lien on the judgment, was held entitled to use the name of the nominal plaintiff for the purpose of maintaining an action against the sheriff for an escape, although the sheriff received a release from the plaintiff for suffering the escape. This decision is upon the principle that such action is one of the fruits of the judgment which belong to the attorney and grow out of the lien. It is not apparent why the bond should not be viewed in the same manner.

By the act of August 11, 1848, c. 85, sec. 3, it is provided that in an action founded upon a bond given for release from arrest on execution, if the whole amount due upon the execution be recovered, the new judgment shall operate as a discharge of the execution; if only a part of the amount be recovered, the new judgment shall operate as a discharge of such part. So that when the whole amount of the execution is recovered in an action on the bond, unless the lien runs with the bond it would be lost, and its operation upon a part discharged would also be defeated. But there is no reason to suppose that the legislature intended to take away the lien for the costs in the first action, and if it remains it must follow the bond and become attached to the judgment on the bond, the latter judgment taking the place of the former. If, then, the lien follows the bond as an incident of the first judgment and remains with the bond, the creditor can not discharge it to the prejudice of the attorney's lien. And such appears to be the force and effect which ought to be given to it. The conclusion is, that this action can be maintained for the amount of the attorney's lien, the amount of which is agreed upon by the parties, notwithstanding the acknowledgment of satisfaction of the judgment and bond made by the plaintiff.

Defendants defaulted.

TENNEY, J., not having been present at the argument, did not participate in the decision.

ATTORNEY'S LIEN FOR COMPENSATION FOR FEES AND DISBURSEMENTS: See note to *Andrews v. Morse*, 31 Am. Dec. 755 et seq. In this case it was held that the attorney could proceed with the execution against the debtor, although the debtor had paid the judgment. In *Clark v. Rowling*, 53 Id. 290, it is held that costs included in the judgment are discharged when the principal debt is discharged, but not as against the attorney.

BIRD v. SMITH.

[34 MAINE, 63.]

JUDGMENT IS CONCLUSIVE EVIDENCE THAT IT WAS DUE to its full amount when recovered.

EVIDENCE OF FACTS THAT EXISTED BEFORE RENDITION OF JUDGMENT is not admissible to show that the amount of the judgment is not all due.

MERE PROPOSITION TO ACCEPT LESS THAN FULL AMOUNT OF JUDGMENT in full discharge thereof, if unaccepted by the judgment debtor, will have no effect upon the recovery of the full amount of the judgment.

PART PAYMENT OF DEBT UPON WHICH JUDGMENT HAS BEEN RECOVERED, made prior to rendition of judgment, is no defense to an action on a check given in satisfaction of the judgment, whether the payment was made to the nominal plaintiff or to one having an equitable interest in the judgment.

ASSUMPSIT on a check. Smith, the defendant, executed a promissory note for one thousand five hundred dollars and interest to Ellis. Ellis negotiated it to Ephraim Woodman as collateral security for a loan of three hundred and thirty-eight dollars. Before its maturity, Ephraim Woodman transferred it to Oliver O. Woodman, who recovered judgment upon it for two thousand two hundred and eighty-five dollars and costs. Execution was issued, and was given for collection to Bird, the plaintiff, who was a deputy sheriff. Bird received from the defendant, in payment of the balance due upon the judgment and interest, the check in suit. It was for the amount of two thousand three hundred and eighteen dollars and sixty-six cents; and not being paid at maturity, this action was commenced. The defense was, that neither Oliver nor Ephraim Woodman had any interest in the judgment beyond three hundred and thirty-eight dollars and interest, and that the rest of the debt belonged to Ellis. The remaining facts upon which the defendant relied are sufficiently stated in the opinion. The case came up on report from *nisi prius*.

J. S. Abbott, for the plaintiff,

S. Fessenden and F. O. J. Smith, for the defendant.

By Court, WELLS, J. Oliver O. Woodman, on the second Tuesday of June, 1850, recovered a judgment against the defendant on a promissory note given by the defendant to Benjamin H. Ellis, and which was negotiated by Ellis to Ephraim Woodman, and by him to said Oliver. The check in suit was received in part payment of the execution which issued on the judgment.

The defendant contends that the note was held by the Woodmans as collateral security for a sum much less than the amount of it loaned by Ephraim Woodman to Ellis, and he offered to prove that the balance due on the note belonged to Ellis, that Ellis had prescribed the manner in which that balance should be paid, and that before the commencement of this suit he had paid such balance in the manner directed by said Ellis. But the proof offered related to facts which existed before the recovery of the judgment by Oliver O. Woodman. If any portion

of the debt had been paid to Ellis or by his direction, and proof of such payment was admissible against Woodman, it should have been presented in defense of the former action. The judgment in favor of Woodman is conclusive evidence that it was due to its full amount when recovered. And the introduction of evidence, which existed before the rendition of the judgment, to show that it is not all due, would impair the force and effect which the law gives to it. If the judgment were in favor of Ellis himself, testimony, showing that the debt on which it was founded had been paid before the judgment, either in whole or in part, would be clearly inadmissible, for such testimony would directly contradict the judgment. If Woodman held the judgment partly for himself and partly in trust for Ellis, and a payment made to Ellis after it was rendered were admissible in evidence on the ground of its having been made to the equitable owner, no evidence was offered of any such payment.

The proof offered, that both of the Woodmans had repeatedly offered to the defendant to receive from him the sum of three hundred and thirty-eight dollars and interest, in discharge of their claim on said judgment and execution, could have had no legal effect, if it had been received in evidence. The offer was not accepted and no money was paid, and the debt was unaffected by it. It was merely a proposition not accepted or acted upon. Nor does the letter of Ephraim Woodman, if it were admissible in evidence upon proof that he was part owner of the execution, show any part of it to have been paid; but on the contrary, it denies that either he or Oliver has received any part of the debt. His expression of a willingness to make a proper adjustment does not tend in the remotest degree to establish any fact showing the judgment has been paid or satisfied in any manner whatever. And if Oliver had received a portion of the judgment while the balance belonged to Ellis, and that was known to the defendant, his release of the whole could not have deprived Ellis of his part, and facts existing anterior to the judgment could not have been received to defeat his title to such part.

The testimony offered was properly rejected, and the amount of the check, which was taken in part satisfaction of the execution, is recoverable in this action.

Defendant defaulted.

JUDGMENT OF COURT OF COMPETENT JURISDICTION CONCLUSIVE as to all matters which might have been litigated in same cause: See *Embury v. Con-*

ner, 53 Am. Dec. 325, and note, citing prior cases; *Doty v. Brown*, Id. 350, and note.

THE PRINCIPAL CASE IS CITED in *Plaisted v. Hoar*, 45 Me. 385. This case held that the act of an officer that takes an accountable receipt from a debtor whose property has been seized, in which the debtor promises to keep the goods longer than the statutory period within which the officer must sell, is unlawful and the receipt can not be enforced. "The case of *Bird v. Smith*, 34 Me. 63," said the court, "is not analogous to the one before us. The officer having the execution discharged it on receiving the check of the debtor. In this case it is agreed that the execution was not discharged."

MILLER v. GODDARD.

[34 MAINE, 102.]

WHERE ENTIRE SERVICE IS TO BE PERFORMED for an entire compensation, to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation.

ONE CONTRACTING TO LABOR FOR SPECIFIED TIME AT AGREED PRICE per month may recover all the damages he has sustained by the breach of the contract if the employer discharge him without justifiable cause before the expiration of the specified time; but if the employee has departed from the contract without justifiable cause, he can recover nothing.

APPELLATE COURT CAN NOT DECIDE UPON GENERAL MERITS OF CASE PRESENTED BY EXCEPTIONS, but can determine merely the legality of the proceedings excepted to.

ASSUMPSIT for work and labor performed. Verdict was rendered for the plaintiff, and the defendant excepted to the judge's charge to the jury. The case is sufficiently stated in the opinion.

Peters, for the defendant.

C. P. Brown, for the plaintiff.

By Court, WELLS, J. This was an action for work performed under a special contract, in which, it was alleged, the plaintiff was to labor during the season of lumbering at an agreed price per month.

The judge of the district court instructed the jury, in substance, that if the plaintiff left the employment of the defendant before the contract was performed, without the fault or consent of the defendant, still the plaintiff could recover his wages for the time he labored, deducting the damages which the defendant sustained by a want of entire performance of the contract, and if they were equal to the wages or exceeded them, then the plaintiff could not recover anything.

It is a rule of the common law, that where an entire service is to be performed, for an entire compensation to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation. The language of such contract indicates clearly that it is not intended by the parties that the stipulated price should be paid until the service is performed. And it is manifest that the rule is founded in the familiar principle, that contracts should be expounded and executed according to the true and just intent of the parties: *Cutter v. Powell*, 6 T. R. 320; *Spain v. Arnott*, 2 Stark. 256. "Unless there be some express stipulation to the contrary, whenever a specific sum is to be paid for specific work, the performance or service is a condition precedent; there being one condition and one debt, they can not be divided:" 3 Stark. Ev. 1303.

In the case of *Stark v. Parker*, 2 Pick. 267 [13 Am. Dec. 425], which was an action for services rendered, it was held that the plaintiff must perform the agreed service as a condition precedent to his right to recover anything under the contract, and that he could not renounce the contract and recover on a *quantum meruit*. The same principle is confirmed in *Omstead v. Beale*, 19 Id. 528. And the law is held to be the same in *Lantry v. Parks*, 8 Cow. 63.

In New Hampshire, it has been thought more equitable that in such cases the laborer who has departed from his contract should recover what his services were reasonably worth: *Britton v. Turner*, 6 N. H. 481 [26 Am. Dec. 713]. When the laborer has adequate cause to justify an omission to fulfill the contract, he can not be regarded as in any fault. But it does not very well accord with the good faith, which the rules of law uniformly require, to allow him to stop at any stage of his labor, in open violation of his agreement, and still compel his employer to pay him what his services are worth. If it were permitted to the laborer to determine the contract at his pleasure, no well-founded reliance could be placed at any time upon a due observance of it.

It is contended that this case falls within that class where work and labor and materials are furnished in the performance of contracts, like those of *Hayden v. Madison*, 7 Greenl. 79; *Abbot v. Hermon*, Id. 118; and *Norris v. School District in Windsor*, 12 Me. 293 [28 Am. Dec. 182], and there is not a complete and full performance in all respects. But it will be found in those cases that there was a waiver of a strict compliance, or an ac-

ceptance of what was done, or that the work was done and the materials furnished, but not in the manner specified in the contract, and without any intentional variation from it: *Knowlton v. Inhabitants of Plantation No. 4*, 14 Id. 20.

The present case is not one of an imperfect performance, as it would be if the plaintiff had labored during the time, but had performed his labor in a negligent and unskillful manner; but an absolute want of performance, for a portion of the time employed, is the ground upon which the instruction was based.

It is contended that, independently of the instruction under consideration, upon a correct view of the law and the facts, the plaintiff is entitled to retain the verdict. But it is not the province of the court, when a case is presented by exceptions, to decide upon its general merits, but to determine whether the law applicable to it was correctly given to the jury.

If the defendant discharged the plaintiff before the expiration of the time for which he was employed, without justifiable cause, the plaintiff will be entitled to recover all the damages which he has sustained by the breach of the contract; but if the plaintiff has departed from it, without justifiable cause, he can not recover anything.

The exceptions are sustained.

RECOVERY BY EMPLOYEE FOR PART PERFORMANCE OF ENTIRE CONTRACT: See *McKinney v. Springer*, 54 Am. Dec. 470, and note collecting the prior cases; *Clark v. City of New York*, 53 Id. 379, and note.

SUPERVISION OF APPELLATE COURT IS CONFINED TO LEGALITY OF PROCEEDINGS OF COURT BELOW: *Bolles v. Beach*, 53 Am. Dec. 263, and note citing prior cases.

MOODY v. BROWN.

[34 MAINE, 107.]

MANUFACTURER CAN NOT RECOVER VALUE OF ARTICLE MANUFACTURED until the property has passed from him to the customer.

TITLE TO MANUFACTURED PROPERTY IS CHANGED FROM MANUFACTURER TO CUSTOMER only by the assent of both parties.

MERE ORDER GIVEN FOR MANUFACTURE OF ARTICLE DOES NOT AFFECT TITLE.

MANUFACTURED ARTICLE CONTINUES TO BE MANUFACTURER'S PROPERTY until completed, tendered, and accepted by the party ordering it. There must be proof of acceptance, or of act or words respecting it, from which an acceptance may be inferred.

LEAVING MANUFACTURED ARTICLE WITH PARTY THAT HAS ORDERED IT will not transfer title to him, if done against his will.

PROPERTY IN MANUFACTURED ARTICLE PASSES TO PARTY ORDERING IT, without tender and acceptance of it, when he employs a superintendent, and pays for it by installments as the work is performed.

ASSUMPSIT for materials and labor furnished, and for articles sold and delivered. The latter count was for eighteen dollars, the value of some stereotype plates manufactured to defendant's order, for four dollars for the alteration of them, and for some incidental expenditures, amounting altogether to twenty-five dollars and four cents. It was testified by a witness for the plaintiff that when the witness had presented the bill for the plates the defendant said that he had ordered them, but he did not feel able to take them, and that they were imperfect and to be corrected by the plaintiff at his own expense; that the witness afterwards took the plates to the defendant's store and left them there against his refusal and remonstrance; that afterwards the defendant had repeatedly offered to pay twenty dollars in full of the bill, and that the witness had at one time asked him when he would do so, and he had replied that he would pay it in a few days. The instructions of the judge to the effect that if the plaintiff ordered the plates but refused to accept them, although he might be liable in damages for a breach of contract, he was not liable for their value; that the leaving the plates at his store against his consent and remonstrance could not affect his liabilities; but if the defendant's offer to pay twenty dollars was accepted, that the plaintiff might recover twenty dollars and interest from the time of acceptance; but without the acceptance the defendant was not bound by his offer. Verdict for the defendant, and exceptions by the plaintiff.

J. E. Godfrey, for the plaintiff.

Simpson, for the defendant.

By Court, SHEPLEY, C. J. There is not a perfect agreement of the decided cases upon the question presented by the exceptions.

The law appears to be entirely settled in England in accordance with the instructions: *Atkinson v. Bell*, 8 Barn. & Cress. 277; *Elliott v. Pybus*, 10 Bing. 512; *Clarke v. Spence*, 4 Ad. & El. 448.

The case of *Bement v. Smith*, 15 Wend. 493, decides the law to be otherwise in the state of New York. The case of *Towers v. Osborne*, 1 Stra. 506, was referred to as an authority for it. The plaintiff in that case does appear to have recovered for the value of a chariot which the defendant had refused to take. No

question appears to have been made respecting his right to do so, if he was entitled to maintain an action. The only question decided was, whether the case was within the statute of frauds.

In the case of *Bement v. Smith*, *supra*, Chief Justice Savage appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order and tendered to a customer refusing to receive it.

This can only be correct upon the ground that by a tender the property passes from the manufacturer to the customer against his will. This is not the ordinary effect of a tender. If the property does not pass, and the manufacturer may commence an action and recover for its value, while his action is pending, it may be seized and sold by one of his creditors, and his legal rights be thereby varied, or he may receive benefit of its value twice, while the customer loses the value.

The correct principle appears to have been stated by Tindal, C. J., in the case of *Elliott v. Pybus*, *supra*, that the manufacturer's right to recover for the value depends upon the question whether the property has passed from him to the customer. The value should not be recovered of the customer, unless he has become the owner of the property, and can protect it against any assignee or creditor of the manufacturer.

To effect a change in the property, there must be an assent of both parties. It is admitted that the mere order given for the manufacturer of the article does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred, to pass the property.

This appears to be the result of the best considered cases. There is a particular class of cases to which this rule does not apply, where the customer employs a superintendent and pays for the property manufactured by installments as the work is performed.

Exceptions overruled.

OWNERSHIP OF PROPERTY MANUFACTURED TO ORDER, AND REMEDY OF MANUFACTURER WHEN EMPLOYER REFUSES TO ACCEPT.—An article manufactured to order belongs to the owner of the principal materials, and if the manufacturer furnishes the principal materials used in constructing the manufactured article, he owns the article until its completion, and after its completion, until it is delivered to the party ordering it: See note to *Puleifer v. Page*, 54 Am. Dec. 586, 587. And see, in addition to the authorities there cited,

Bennett v. Platt, 9 Pick. 558; *Blaisdell v. Souther*, 6 Gray, 149, 152; *Pettingill v. Merrill*, 47 Me. 109.

WHAT DELIVERY IS NECESSARY TO VEST OWNERSHIP OF MANUFACTURED PROPERTY IN EMPLOYER.—The rule of the principal case, that some delivery, express or implied, is necessary to vest the title to the manufactured property in the party ordering it, is a fundamental doctrine of all executory contracts of sale. But what will be a sufficient act of delivery and acceptance in the circumstances of different cases is determined principally upon the criterion whether an intention of the parties that such act should constitute a delivery is manifested by those acts. In addition to this, the physical conditions surrounding each case are to be taken into consideration. And what might be a valid act of delivery or tender in one case would perhaps not be sufficient in another. Thus where the commodity is ponderous and bulky, as copper, manual delivery is not necessary. An offer of a warehouse receipt for the amount of copper ordered would be a sufficient tender to authorize a suit for the price: *Hayden v. Demets*, 53 N. Y. 426.

But a delivery can not be consummated while anything remains to be done upon the article purchased, or in the fulfillment of the contract between the parties. Thus when cars were completed with the exception of parts which were to be furnished by the defendant, still they were not his property, and if destroyed by accident the manufacturer could not recover for his labor and materials: *McConihe v. N. Y. etc. R. R. Co.*, 20 N. Y. 495. Nor is the mere completion of the article sufficient to pass the title. And though part of the articles be delivered, the rest, if not delivered, remain the property of the manufacturer: *Sutton v. Campbell*, 2 Thomp. & C. 595. But the title to the portion delivered passes out of the manufacturer: *Veazie v. Holmes*, 40 Me. 69. When, however, the property is completed, any acts of the parties sufficient to manifest an intention of delivery and acceptance will vest the title in the vendee. Thus payment of the price by the vendee after seeing the goods and a direction to ship them are acts sufficient to vest the title in the vendee: *Hubbard v. O'Brien*, 8 Hun, 244. So where a wagon was paid for and left in the maker's possession to be called for: *Powers v. Barber*, 7 Alb. L. J. 170. A boiler deposited by order of the vendee upon his lot, and paid for, becomes his property: *Pratt v. Maynard*, 116 Mass. 388. Although the article to be manufactured remains the property of the manufacturer until completed and delivered, still an article in an unfinished state may be purchased by the vendee from the manufacturer, and the title will be in the vendee though he stipulate as a condition of the sale that the manufacturer complete the article: *Thorndike v. Bath*, 114 Mass. 116.

Title to a manufactured article does not pass to the party ordering it, although the full price agreed upon be paid in advance. The party ordering does not by advancing the purchase price buy the article under construction, he merely becomes entitled to such an article as he has ordered; and if the manufacturer does not fulfill his contract, and deliver an article such as was ordered, an action for the breach will lie. The chattel, if manufactured out of the manufacturer's materials, remains his property until completion and delivery to the customer: *Halterline v. Rice*, 62 Barb. 593; *Shaw v. Smith*, 48 Conn. 306; S. C., 40 Am. Rep. 170; *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. 517; *Gowans v. Consolidated Bank of Canada*, 43 U. C. Q. B. 318. See *Sutton v. Campbell*, 2 Thomp. & C. 595.

A delivery made in accordance with a prior agreement between the parties will be sufficient to pass the title: *Ruttary v. Cook*, 50 Ala. 352; *Brewer v. Michigan Salt Association*, 47 Mich. 526; *Cook v. Millard*, 5 Laus. 243; *Pacific*

Iron Works v. Long Island R. R., 62 N. Y. 272; *Higgins v. Murray*, 73 Id. 252; *Galloway v. Week*, 54 Wis. 604. Title to lumber sawed to order passes to the orderer when it is sawed, piled, and the orderer notified: *Rattory v. Cook*, 50 Ala. 352; *Bates v. Conkling*, 10 Wend. 389. In *Wright v. O'Brien*, 5 Daly, 54, an agreement was made with an artist to pay a certain amount for the work done on a picture that had been ordered, and the artist agreed to deliver the picture to another artist, who was to complete the painting. It was held that the property in the picture passed to the orderer at the time of the agreement and before the payment of the agreed sum, and he recovered the picture from a levy against the first artist. But if part of the agreement is yet unperformed, as an inspection of the property by the vendee, the title can not pass till this is done: *Stephens v. Santee*, 49 N. Y. 35.

ORDERER MAY RETURN ARTICLE MANUFACTURED IF NOT SATISFACTORY. If the article manufactured to order does not, when completed, fulfill the contract entered into between the manufacturer and the party ordering, the latter may, within a reasonable time, return the chattel, and under such circumstances, the property never exists in the orderer: *Craver v. Hornburg*, 26 Kan. 94; *Phelps v. Willard*, 16 Pick. 29; *Brown v. Foster*, 113 Mass. 136. When the manufacturer agrees to make an article satisfactory to the customer, if it is not satisfactory, though it be a mere matter of caprice, yet the customer may return it: *Brown v. Foster*, Id. 136, 139. A machine, although on the vendee's premises, yet not accepted because it did not work satisfactorily, is not his property, and not attachable for his debt: *Phelps v. Willard*, 16 Pick. 29. But in *Mount Hope Iron Co. v. Buffington*, 103 Mass. 62, an engine in somewhat similar circumstances was held to be the vendee's property. The engine had been delivered and set up, and the whole price paid except a margin of twenty per cent., reserved until it should be started and shown to work in a satisfactory manner; but it was held to be the vendee's property, and not attachable for the manufacturer's debt. If, however, though the property is unsatisfactory and does not fulfill the agreement concerning its construction, yet the orderer makes no complaint and does not offer to return it within a reasonable time, the title passes, and he is answerable for the price: *Mackey v. Swartz*, 16 Rep. 75; *Howard v. Hayes*, 15 Jones & S. 89.

VESSEL CONSTRUCTED TO ORDER UNDER SUPERINTENDENCE OF ORDERER OF his agent, and upon which installments of the price are paid as the work progresses, is in England the property of the orderer. These acts of the parties, the permission by the builder of the superintendence of the orderer's agent and the payment of the installments by the orderer, are held to be acts which sufficiently import an intention that the vessel shall be continually during the course of construction the property of the orderer. The payment of installments as the work progresses is considered also as a purchase of the labor and materials already furnished, or indeed a furnishing of the materials and labor, the builder becoming a contractor or agent of the orderer. The law was settled in England in this way by the well-reasoned cases of *Woods v. Russell*, 5 Barn. & Ald. 942, and *Clarke v. Spence*, 4 Ad. & El. 468. To the same effect is *Wood v. Bell*, 5 El. & Bl. 772. The New York and Massachusetts authorities have not followed the English doctrine, but hold that under such circumstances the property in the vessel remains in the builder until it is completed and delivered: *Andrews v. Durant*, 11 N. Y. 35; *Merritt v. Johnson*, 7 Johns. 473; S. C., 5 Am. Dec. 289; *People v. Commissioners of Taxes*, 58 N. Y. 242; *Williams v. Jackman*, 16 Gray, 514; *Briggs v. A Light Boat*, 7 Allen, 287. So in New Jersey: *Elliott v. Edwards*, 35 N. J. L. 265;

S. C., 36 Id. 449; 34 Id. 96; 21 Wall. 532. Some American cases, however, adopt the English doctrine: *Scudder v. Calais Steamboat Co.*, 1 Cliff. 370; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522; *Derbyshire's Estate*, 11 Phila. 627; S. C., 81 Pa. St. 18; but see *Scull v. Shakespear*, 75 Id. 297. But even in England, if the price of the vessel is merely paid in advance of its completion, the vessel does not thereby become the property of the orderer: *Mucklow v. Mangles*, 1 Taunt. 318; *Laidler v. Burlinson*, 2 Mee. & W. 614. In the latter case Lord Abinger, C. B., said that there was no necessity of qualifying the doctrine of *Woods v. Russell*, and *Clarke v. Spence*, *supra*, as in this case there was no manifest intention of transferring the property to the orderer, but the payment of the price in advance was a payment of the price of the vessel in a complete state, and therefore until completion the article purchased was not *in esse*, and could not become the purchaser's property. See also *Ex parte Lambton*, L. R., 10 Ch. Ap., 405, 414.

EFFECT OF PAYMENT OF INSTALLMENTS OF PRICE IN OTHER CASES.—In *Bank of Upper Canada v. Killaly*, 21 U. C. Q. B. 9, it was held that the payment of periodical installments to the manufacturer, in amounts according to the estimates made by the orderer's agent of the value of the materials furnished and the work done at the time of the payments respectively, vested the property in the chattels during their manufacture in the orderer. In Massachusetts, one who advances money on machines to help in their construction becomes a tenant in common with the manufacturer: *Beaumont v. Crane*, 14 Mass. 400. But the mere payment of installments during their construction does not vest the property in the manufactured article in the person making the payments: *Wright v. Tetlow*, 99 Id. 397. Pillars constructed by a builder for a house that he is erecting do not belong to the owner of the house until affixed to the house or delivered to the owner, although a part payment has been made on the house: *Johnson v. Hunt*, 11 Wend. 139.

WHAT DELIVERY NECESSARY TO ENABLE MANUFACTURER TO MAINTAIN ACTION FOR PRICE.—That actual acceptance by the orderer of the article manufactured is necessary before the manufacturer can maintain an action for the contract price is held in *Atkinson v. Bell*, 8 Barn. & Cres. 277; *Hosmer v. Wilson*, 7 Mich. 294; *Gamage v. Alexander*, 14 Tex. 414; *Rider v. Kelley*, 32 Vt. 268; and the principal case. And these cases hold that the manufacturer's remedy, when the orderer refuses to accept, is a special action on the case for the breach of the contract, in which the measure of damages will be the difference between the contract price and the market value at the time of the delivery. In *Hosmer v. Wilson*, 7 Mich. 294, which cites the principal case, page 304, the order for manufacture was countermanded, and the manufacturer attempted to recover on the common counts for the value of the labor and materials furnished at the time of the countermanding order. His action, it was held, should have been a special action for the breach. Of course an acceptance may be implied, as where the property after completion has been shipped pursuant to the order of the employer, whether the goods be destroyed in the transit or the employer refuse to accept them when they arrive: *Higgins v. Murray*, 73 N. Y. 252; *Pacific Iron Works v. Long Island R. R.*, 62 Id. 272. And in *Allen v. Jarvis*, 20 Conn. 37, the plaintiff was allowed to recover on a count for work and labor the full value of an article made to order and not accepted by the defendant, as under the peculiar circumstances of the case the article, which was a patented surgical instrument, and therefore not salable, was worth less in the manufacturer's hands. See *Rand v. White Mts. R. R.*, 40 Id. 85.

But the main current of authorities allows the manufacturer to maintain an action for the contract price, notwithstanding the orderer's refusal to accept, when, of course, the orderer may set up as a defense any failure of the manufacturer to comply with the terms of the contract; for example, the faulty construction of the manufactured product. In an ordinary executory sale, when the article offered is of a character to satisfy the contract, after offer of delivery, the vendor may have the choice of three remedies: 1. He may store or retain the property for the vendee and sue him for the entire purchase price; 2. He may sell the property, acting as agent of the vendee for this purpose, and recover the difference between the contract price and the price obtained at such resale; or, 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price: *Dunstan v. McAndrew*, 44 N. Y. 72, 78; *Polien v. Le Roy*, 30 Id. 549, 556; *Hayden v. Demets*, 53 Id. 426; *Bridgford v. Crocker*, 60 Id. 627; *Mason v. Decker*, 72 Id. 595, 599; *Hunter v. Wetsell*, 84 Id. 549, 555; *Hughes v. United States*, 4 Ct. of Cl. 64, 74. See note to *Masterton v. Mayor of Brooklyn*, 42 Am. Dec. 48. And this rule is now applied by the majority of cases to the contract of manufacture. These cases adopt the rule of *Bement v. Smith*, 15 Wend. 493, cited in the principal case. In that case a carriage was built to order and tendered to the customer. He refused to accept it, and the manufacturer deposited the vehicle with a third person, notified the customer, and sued him for goods sold and delivered, averring delivery. His action was sustained and he recovered the price. This case has been followed by many courts; and it is now the rule maintained by the weight and majority of authority, that after completion of the article ordered, if the orderer when it is tendered refuse to accept it, the manufacturer may immediately have his action for the contract price of the goods: *Throubboron v. Lewis*, 43 Mich. 635; *Armstrong v. Turner*, 49 Mo. 589, 599; *Gordon v. Norris*, 49 N. H. 376, 384; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Towers v. Osborne*, 1 Stra. 506. See *Pacific Iron Works v. Long Island R. R.*, 62 N. Y. 272; *Elliott v. Pybus*, 10 Bing. 512.

So after the completion of the article, and notice of that fact given by the manufacturer to the orderer, the manufacturer may sue for the contract price although no other tender or offer of delivery is made: *McIntyre v. Kline*, 30 Miss. 361; *Higgins v. Murray*, 4 Hun. 565; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Ballentine v. Roinson*, 46 Pa. St. 177. In *Goddard v. Binney*, 115 Mass. 450, when the buggy ordered to be built was completed, the vendee was notified and a bill sent. The vendee retained the bill and promised to "see about it." The property was then destroyed by fire, and this was an action by the manufacturer for the price of the vehicle. It was held that at the time of the fire the property was in the vendee, and the plaintiff's action was sustained. We have seen that if the article ordered does not when completed fulfill the contract, the orderer is not bound to accept it although he has received it, but may return it within a reasonable time. Under an agreement to make a satisfactory suit of clothes, the defendant returned the suit as unsatisfactory. It was held that the tailor had no action for the price: *Brown v. Foster*, 113 Id. 136. But the return must be made within a reasonable time: *Howard v. Hayes*, 15 Jones & S. 89; and it should fail to fulfill the contract in some material respect. A mere frivolous complaint should not excuse the orderer from payment. Thus, a safe was ordered and received. Its ornamentation was not strictly in conformity to the order, but no offer was made to return it, nor was any complaint made. The purchaser could not afterwards refuse to pay for it for this reason merely; and the manufacturer

recovered the price in an action for goods sold and delivered: *Mackey v. Swartz*, 16 Rep. 75. Acceptance as satisfactory may be inferred from the acts of the vendee after receiving the property. Thus in an action for the price of a monument, acceptance of it may be inferred from evidence that it had been allowed by the orderer to remain in position on his lot for more than a year without objection or request to remove it, and that he had since graded his lot and turfed up the sides of the monument: *Hedden v. Roberts*, 134 Mass. 38.

DELIVERY TO PASS TITLE TO GOODS SOLD: See *Messer v. Woodman*, 53 Am. Dec. 241, and note citing prior cases.

SOUTTER v. ATWOOD.

[34 MAINE, 153.]

PARTY OWNING UNDIVIDED HALF INTEREST IN LAND, BUT OCCUPYING WHOLE TRACT and receiving all the rents and profits, can not be compelled, in a suit in equity by a party owning half the property in severalty, to convey to the latter an undivided half of the premises, nor such portion thereof as he is entitled to possess in severalty; nor can the owner of the undivided half be coerced in equity to sue for partition and to account for the rents and profits, at least not by a court not possessing general equity powers, and among whose special powers this is not included.

PARTITION WILL NOT BE DECREED BETWEEN TENANT IN COMMON OF WHOLE AND OWNER IN SEVERALTY OF PART. Two tenants in common, one of whom gave a mortgage of his undivided half for its purchase price, divided the common property by metes and bounds, executing mutual deeds. The owner of the unmortgaged half conveyed his share in severalty to the plaintiff, and also executed to him a deed of an undivided half of the whole tract. The mortgage of the undivided half was foreclosed, and under the foreclosure the defendant claimed. *Held*, the plaintiff became owner of one half by metes and bounds. The defendant is owner of an undivided half interest. The plaintiff failed to secure a title sufficient to enable him to dispossess the defendant, who occupies the whole tract. The defendant is guilty of no fraud, and the court has no jurisdiction on that ground to compel them to partition the property and account for the rents and profits.

SUPREME COURT OF MAINE DOES NOT POSSESS GENERAL EQUITY POWERS, but is authorized to act as a court of equity only in certain cases pointed out in the statute.

BILL in equity containing allegations substantially as follows: One of two tenants in common of a tract of land conveyed his undivided half interest to one McLaughlin, who gave back to him a mortgage for the purchase price. The other co-tenant conveyed away his undivided half, which through mesne conveyances became the property of one Goodhue. McLaughlin and Goodhue partitioned the property. McLaughlin conveyed the south half by metes and bounds to Goodhue, and Goodhue con-

veyed the north half by metes and bounds to McLaughlin. Afterwards Goodhue conveyed by metes and bounds his share that he now held in severalty, that is, the south half, to the plaintiffs. He afterwards executed to them a deed of an undivided half of the whole tract. The mortgage was assigned to one Porter, who foreclosed it. These plaintiffs petitioned for a partition against Porter: *Soutter et al. v. Porter*, 27 Me. 405; when it was held that Goodhue's title extended only to the south half in severalty, being limited by the division deeds, and therefore his subsequent conveyance of an undivided half was inoperative. Wherefore, as the plaintiffs had failed to show an undivided interest in the land, they were not entitled to partition, and the petition was dismissed. Meanwhile Porter's interest, by means of several conveyances, had become vested in these defendants. They took possession by their lessees of both the north and south halves, and received rent from both portions. The plaintiffs then prayed for the relief stated in the opinion, offering to pay the necessary expenses of the partition if the defendants should be compelled to institute proceedings therefor. The defendants filed a general demurrer to the bill.

Hobbs and Fessenden, for the plaintiffs.

Rowe and Bartlett, for the defendants.

By Court, RICE, J. This is a bill in equity, to which there has been a demurrer and joinder.

The plaintiffs claim to be equitably entitled to recover possession of and to hold one half part of certain real estate, described in their bill, situated in the city of Bangor. The subject-matter referred to in the bill was before this court in 1847 on a petition for partition: *Soutter et al. v. Porter*, 27 Me. 405. Since that time the interest of Porter has passed by sundry conveyances to the defendants.

It is alleged in the bill, and admitted by the demurrer, that the defendants are the legal owners of one undivided half of the entire estate, deriving their title through sundry mesne conveyances from one Micajah Drinkwater, and that the title of the plaintiffs is as set forth in the bill, being a claim to represent the interest formerly owned by Stephen Goodhue. The defendants are in possession of the whole estate.

A careful examination of the title was had in the case of *Soutter v. Porter*, *supra*, and the court then decided that the petitioners have "failed to establish any title as tenants in common to an undivided share of the premises."

The plaintiffs now pray for relief; and that this court will by decree compel the defendants to convey to them one undivided half of the premises, or such portion thereof as they are entitled to possess in severalty, or that the defendants may be in like manner compelled to enter their petition for partition of the premises, according to the provisions of the statute, and procure partition to be made with the plaintiffs, and also to account for rents, etc.

The defendants claim title to one half of the estate only, and the plaintiffs admit their title to be valid to that extent, and deny their right to any greater interest. Such being the extent of the defendants' interest in the estate, it is difficult to perceive how on any equitable principle they could be compelled against their will, and without consideration, to convey that interest, or any portion thereof, to the plaintiffs, even if this court had power to make and enforce such a decree. And it is equally difficult to understand on what principles they should be compelled to convey property to which they claim no title.

The defendants may, if they elect, obtain partition of property which they hold in common with others. The plaintiffs ask that they shall be compelled to do so, against their will. The question for consideration is, whether such compulsory power is possessed by the court.

This court does not possess general equity powers, but is authorized to act as a court of equity in certain cases and classes of cases, pointed out in the statutes, but this case is not among them.

It was intimated at the argument that this case might fall under the clause of the statute authorizing the court to act in cases of fraud, though it was not very distinctly pointed out wherein the defendants had acted fraudulently. The facts seem to be simply, that the defendants, being the undisputed owners of one undivided half of the estate and in the actual possession of the whole, decline to yield that possession until some party having the right shall in a legal manner dispossess them. The plaintiffs have attempted to obtain title to a portion of the common property. With that attempt the defendants have in no way interfered. Thus far the plaintiffs have failed to secure such a title as will enable them to dispossess the defendants. This would rather seem to be their misfortune than the defendants' fault. We are unable to perceive any act of the defendants which so savors of fraud as to authorize the court to interfere on that ground.

The defendants can only be required to account for rents to the party who has the legal title to that portion of the estate not owned by them.

The bill is therefore dismissed, with costs for defendants.

EQUITY DECREES PARTITION WHEN TITLE IS CLEAR: *Howey v. Coings*, 54 Am. Dec. 427; *Wiseley v. Findlay*, 15 Id. 712; *Hanson v. Willard*, 28 Id. 162.

STATE v. McNALLY.

[94 MAINE, 210.]

TESTIMONY OF PUBLIC OFFICER IS ADMISSIBLE IN SUIT IN WHICH HE IS NOT A party, to show that he acted in that capacity.

WARRANT PURPORTING TO BE ISSUED BY JUSTICE OF PEACE, UPON A COMPLAINT SWORN TO BEFORE HIM IN THAT CAPACITY, FURNISHES A PRESUMPTION THAT HE WAS LEGALLY AUTHORIZED SO TO ACT.

TESTIMONY OF COMPLAINANTS IN INDICTMENT AS TO REASONS THAT INDUCED THEM TO BELIEVE THEIR CHARGES TRUE, AND AS TO THEIR PURPOSE IN MAKING THEM, MAY BE EXCLUDED UPON THE TRIAL, AS IT COULD HAVE NO EFFECT UPON THE RIGHTS OR LIABILITIES OF THE DEFENDANTS.

CONSPIRACY TO COMMIT ASSAULT AND BATTERY UPON DEPUTY SHERIFF, IN ORDER TO PREVENT HIM FROM PERFORMING HIS OFFICIAL DUTIES, IS ILLEGAL.

NO ONE IS JUSTIFIED IN RESISTING OFFICER ACTING UNDER PROCESS THAT HE IS LEGALLY AUTHORIZED TO OBEY.

VOID PROCESS IS NO JUSTIFICATION TO OFFICER.

PROCESS, ALTHOUGH VOIDABLE FOR IRREGULARITY OR MISTAKE, PROTECTS OFFICER WHO SERVES IT IF THE MAGISTRATE WHO ISSUED IT HAD JURISDICTION OF THE SUBJECT-MATTER, AND THE PROCESS IS REGULAR ON ITS FACE AND DOES NOT DISCLOSE WANT OF JURISDICTION.

PRINTER'S PUNCTUATION OF PUBLISHED STATUTES MAY BE AN UNCERTAIN GUIDE TO THEIR INTERPRETATION.

IN STATUTE PROVIDING FOR ISSUANCE OF SEARCH-WARRANT "TO ANY sheriff, city marshal or deputy," THE TERM "DEPUTY" RELATES TO BOTH THE marshal and sheriff preceding it, AND THE WARRANT MAY BE ISSUED TO A deputy sheriff.

UNDER STATUTE PROVIDING THAT PARTY SERVED WITH PROCESS BE SUMMONED "FORTHWITH" BEFORE THE JUSTICE OR JUDGE ISSUING THE WARRANT, A WARRANT COMMANDING THE PARTY SERVED TO BE SUMMONED "FORTHWITH TO APPEAR AT A COURT TO BE HOLDEN AT MY OFFICE IN FRANKFORT AT SUCH TIME AS YOU MAY APPOINT," THOUGH IRREGULAR, PROTECTS THE OFFICER SERVING.

STEAMBOAT OR VESSEL MOORED AT WHARF IS "PLACE" LIABLE TO BE SEARCHED, WITHIN MEANING OF A STATUTE THAT PROVIDES THAT "ANY STORE, SHOP, WAREHOUSE, OR OTHER BUILDING OR PLACE IN SAID CITY OR TOWN" MAY BE SEARCHED.

WARRANT NEED NOT BE UNDER SEAL OF MAGISTRATE ISSUING IT UNLESS IT BE EXPRESSLY REQUIRED BY STATUTE.

WAFFER ATTACHED TO WARRANT, WHICH IS USUAL SEAL IN SUCH CASES, IS *prima facie* SUFFICIENT WITHOUT PROOF THAT IT WAS THE SEAL OF THE MAGISTRATE, OR ADOPTED BY HIM.

INDICTMENT against McNally and others, charging a conspiracy to prevent by force the execution of a warrant. The warrant was recited at length; but the objections urged against it are sufficiently stated in the opinion. It commanded the officer to enter the steamer *Boston* and search there for intoxicating liquors kept there and intended for sale by Sanford, the captain of the steamer, as stated in the complaint made on oath before the undersigned justice of the peace. And if any such liquors were found, the officer was commanded to seize and safely keep them until decision be had on the complaint. The warrant was signed "Archibald Jones, justice of the peace." Upon the trial, it appeared from the testimony of the state that Miles Staples, a deputy sheriff of Waldo, went with the warrant upon the steamer *Boston*, which was lying at Frankfort, in Waldo county, and of which McNally was mate and Taylor agent. In the prosecution of his search for liquors, Staples found ten or twelve casks of spirituous liquors, and marked them "seized." After reading his precept in the hearing of McNally and Taylor, he ordered them to assist him in removing the casks from the boat. They refused, and ordered him to leave the vessel. He then called upon others to come on board and render him that aid, whereupon McNally and Taylor, assisted by the crew, immediately began a forcible resistance, and Staples and his assistant were assaulted, beaten, and prevented from removing the casks. John Adams was called by the government and testified that he, as constable of Frankfort, and by virtue of a warrant in his possession, went upon the steamer, seized the casks mentioned, but was restrained from taking them away by the threats and hostile actions of Taylor, McNally, and the crew. The defense objected to the testimony of Adams: 1. Because he was incompetent to testify to his acts as constable until he was legally proved to be such; and, 2. Because he was incompetent to testify to his own authority. Both objections were overruled. The testimony of Jones that he acted as justice of the peace, and was such when he signed the warrant, was objected to as incompetent, and the objection was overruled by the court. The defendants introduced evidence to show that the casks of liquor had been brought from Boston as freight. And Staples on cross-examination admitted that he knew this, and tendered the freight when he attempted to remove the casks. Chase and Curtis, two of the complainants upon whose complaint the search-warrant was issued, were asked by counsel for the defense what reason they had at the time they made the complaint

for believing the charges true, but the objection of the county attorney was sustained. Curtis was asked whether the complaint was not made for the purpose of seizing liquors brought as freight from Boston. Upon the objection of the county attorney, the court ruled that the witness might answer or decline to answer as he chose, and the witness declined. The steamer was a regular licensed coaster plying between Boston and Bangor, and stopping at Frankfort on her way to Bangor, was delayed by the ice from going on to Bangor. The captain intended to return to Boston the next day. The defendants asked the court to instruct the jury that the attempt to remove the liquor from the steamer was illegal, because the warrant was illegal for the reasons stated in the opinion, and because the act under which it was issued did not authorize the seizure of liquors *in transitu* or on freight. They contended that the defendants did no more than their duty as common carriers in defense of their property. The court refused the instructions asked. The verdict was against McNally and Taylor, and they excepted.

Rowe and Bartlett, for the defendants.

Tallman, attorney general, for the plaintiff.

By Court, HATHAWAY, J. The testimony of Adams, as to his acting as constable, etc. (objected to by defendants), was properly admitted, and also that of Jones, that he acted as justice of the peace: *Potter v. Luther*, 3 Johns. 431; *McCoy v. Curtice*, 9 Wend. 17 [24 Am. Dec. 113].

The testimony of Jones that he was a justice of the peace was immaterial, for it appears by the warrant as copied in the indictment that the complaint was made to him as a justice of the peace, that he received it as such, and signed and issued the warrant in that capacity. The presumption, therefore, is that he was legally authorized so to do: *Lowell v. Flint*, 20 Me. 401.

The reasons which induced Chase and Curtis to believe that the charges in the complaint were true, and their purpose in making it could have no effect upon the rights or liabilities of the defendants in this case, and their testimony upon that subject was rightly excluded. The first instruction requested and refused by the judge presiding at the trial was, "that the acts with which the defendants were charged with conspiring to do were not illegal acts," etc. The first count in the indictment charges them with a conspiracy to commit an assault and battery upon Miles Staples, a deputy sheriff, for the purpose of preventing him from performing the duties of his office. The

instruction requested was, therefore, that an assault and battery upon a deputy sheriff to prevent his doing his duty was not an illegal act. It was properly refused.

The correctness of the instructions given, and the propriety of the refusal to give the other instructions requested, may depend upon the question whether or not the warrant under which Staples acted was such a precept as he was legally authorized to obey; for if it were so, he was bound to execute it, and the defendants had no right to resist him.

Officers whose duty it is to execute legal processes committed to them for service should have reasonable protection in the discharge of their duties. Where the process is void, it is no justification to the officer; but where it is merely voidable for irregularity or mistake, he is protected by his precept.

In delivering the opinion of the court in *Sandford v. Nichols*, 13 Mass. 286 [7 Am. Dec. 151], Parker, C. J., said: "It is a general and known principle that executive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty; if those precepts are sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject-matter; but it is necessary that the precept under which the officer acts should be lawful on the face of it."

It was no part of the officer's duty to examine into and decide upon the constitutionality or construction of the statute which authorized his warrant.

It is sufficient where the magistrate has jurisdiction of the subject-matter, if the process is regular on its face and does not disclose want of jurisdiction: *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181]; *Earl v. Camp*, 16 Id. 562.

The counsel for defendants objected, that statute of 1851, c. 211, sec. 11, by virtue of which the warrant was issued, does not authorize a deputy sheriff to serve it, and contended in his argument that the punctuation of the printed statute sustained this objection. The language of the statute is: "Said justice, etc., shall issue his warrant of search to any sheriff, city marshal or deputy."

The printer's punctuation of the published laws might be an uncertain guide in their interpretation. We think the term "deputy," in the statute, relates to both the marshal and sheriff preceding it.

It was also contended that the proceedings for seizing said liquors were unauthorized by law, because the warrant com-

manded the officer to appoint such time for the hearing of said complaint as he might choose. The language of the statute is: "The owner or keeper of said liquors, etc., shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized." The command of the warrant in this case was "to summon said Sanford forthwith to appear at a court to be holden at my office in Frankfort at such time as you may appoint." Although this might have been an irregularity on the part of the magistrate, it did not render the warrant void, and the rights and duties of the officer were not affected thereby.

The defendants' counsel also objected that a steamboat is not a "place" liable to be searched within the meaning of the statute. The language of the statute is, "any store, shop, warehouse, other building or place in said city or town." This language was evidently intended to comprehend all places (in the city or town) in which the mischief intended to be remedied could exist.

A steamboat or vessel moored at the wharf is a place, as much as is a shop standing upon the wharf. It may be stationed there, and used for the same purposes as the shop. The defendants say the warrant was void because it was not, and did not purport to be, under the seal of the magistrate.

Revised statutes, c. 170, sec. 15, provides that a warrant of search for stolen goods, etc., shall be issued by the magistrate under his hand and seal. The statute of 1851, under which the warrant in this case was issued, provides merely that the justice shall issue his warrant of search. In *Padfield v. Cabell*, Willes, 411, it was held that a warrant need not be under seal unless required by the statute. In that case, Willes, C. J., said: "A warrant does not *ex vi termini* imply an instrument under seal; it signifies no more than an authority. All the books in which it is said that a warrant must be under seal are founded on a case in the year-books, where it is said that a justice of the peace is a judge of record, and hath a seal of office." A justice of the peace in this state has no seal of office.

But whether a seal was necessary or not becomes immaterial, for it appears there was a wafer attached to the warrant as a seal. Defendants' counsel insisted that "there was no evidence either in the warrant itself, or *aliunde*, that the bit of wafer attached to the warrant was the seal of the magistrate, or adopted by him." A wafer attached to the warrant is the usual

seal in such cases, and the fact that it was there was *prima facie* sufficient.

Exceptions overruled.

EVIDENCE OF OFFICIAL ACTS ARE PROOF OF OFFICER'S AUTHORITY: *McCoy v. Curtice*, 24 Am. Dec. 113.

VOID PROCESS AFFORDS NO PROTECTION TO OFFICER SERVING IT: See *State v. Weed*, 53 Am. Dec. 188, and cases cited in the note; *Rollins v. State*, Id. 151; *Breck v. Blanchard*, 51 Id. 222. Irregularity must appear on its face or consist in the mode of issuing it: *Byers v. Fowler*, 54 Id. 272.

INDICTMENT FOR CONSPIRACY, WHEN LIES: See *People v. Richards*, 51 Am. Dec. 75, and note 82-94.

WITNESS IN CRIMINAL TRIAL NOT BOUND TO DISCLOSE FROM WHOM HE OBTAINED INFORMATION which led to the arrest of the accused: *State v. Soper*, 33 Am. Dec. 665.

EFFECT OF OMISSION OF SEAL FROM WRIT: *Woolford v. Dugan*, 35 Am. Dec. 52, and note.

McCRILLIS v. WILSON.

[34 MAINE, 286.]

LIEN IS WAIVED BY INCLUDING IN JUDGMENT ON LIEN CLAIM a claim to which no lien is attached.

LIEN GIVEN BY STATUTE FOR AMOUNT DUE FOR PERSONAL SERVICES does not extend to amount due for hire of oxen and sled employed on the same work.

LIEN FOR PERSONAL SERVICES EXTENDS TO TIME during which the employee is detained by the employer after the work is finished, in anticipation of possible need of his services.

OFFICER IS RESPONSIBLE FOR SALES OF PROPERTY upon which lien has been waived, and which is therefore not liable to such sale.

STATUTORY LIEN ON LUMBER TO LABORERS THEREON FOR AMOUNT STIPULATED TO BE PAID for their personal services, and actually due, will attach, it seems, to lumber labored upon by one in connection with other workmen, though it can not be proved that he or the particular crew of workmen with which he worked labored on the identical lumber sought to be subjected to the lien.

TROVER to recover the value of lumber sold by the defendant as deputy sheriff. Samuel Nash, Royal F. Nash, and James Nash were employed as laborers in cutting and hauling lumber by Haynes & Co. They each brought suit against Haynes & Co., and attached the lumber, claiming a statutory lien. After judgments in the suit were rendered, executions were issued and placed in the hands of the defendant, who sold sufficient of the attached lumber to pay the judgments. The difference between the watches mentioned in the opinion as included in the claim

of Royal F. Nash, was two dollars, which was the amount due him on an exchange of watches. Haynes & Co. employed several teams, which, with the crews attached to them, worked separately in hauling masts in different parts of the timber tract. The defendant could not prove that any one of the plaintiffs in the suits against Haynes & Co. had worked either separately or with his crew upon the identical masts attached and sold. The case is otherwise sufficiently stated in the opinion. The case was submitted on facts agreed.

McCrillis and Crosby, for the plaintiff.

Hobbs and Fessenden, for the defendant.

By Court, APPLETON, J. The plaintiff, owning certain lands, contracted with J. H. Haynes & Co. for cutting and hauling logs and other lumber, and for running the same, for all which he has paid them in full, according to the provisions of his contract. The defendant, a deputy sheriff, seized the same on writs in favor of the several plaintiffs in those suits, who claimed a lien thereon for their labor. It is for this seizure this suit is brought.

It has been decided, in *Bicknell v. Trickey*, 34 Me. 273, that in enforcing the lien for labor upon lumber, the proceedings must be regarded strictly *in rem*, and that by joining such privileged claim with others, the laborer must be considered as having waived his special rights, and as merely standing on an equality with the general creditors of his debtor.

The only questions arising in this case are, In what suits, under which the defendant justifies, has the lien been lost?

In the suit of *Nash v. Haynes* are found charges for "the labor of eight oxen three months and nineteen and one half days, at thirty dollars per month, one hundred and twelve dollars and forty-six cents, and one ox-sled, to haul loads in the woods, three dollars."

The act is entitled an act giving "to laborers on lumber a lien thereon." The lien thus given is "for the amount stipulated to be paid for his personal services, and actually due." The object of this statute was to protect the laborer, and for that purpose alone. The claim for the labor of oxen, or for the value of the sled, can upon no reasonable principles of construction be regarded as for personal services. The same remark applies to the difference between watches, included in the judgment in *Royal F. Nash v. J. H. Haynes et al.* The sales

by the officer, on the executions obtained in these suits, are without justification, and for these he must be held responsible.

In the suit of *James Nash v. J. H. Haynes et al.* is an item for five days detention, five dollars, which makes part of that judgment in favor of the plaintiff. The lien for the rest of the claim is unquestioned. It would seem that the plaintiff, remaining with his employer, ready to render such services as should be required of him, might be viewed as remaining under his contract, and that he ought not to suffer because no special services were required of him. The detention might have been as a matter of prudence on the part of his employer, in the expectation that it might be expedient to continue longer in the work in which they were engaged, or in the anticipation of a rise in the water, which did not occur. If he was detained by his employer, ready to do service for him, but from any unforeseen cause his labor was not needed, he is certainly entitled to his compensation. That he remained with his employer, that he was rightfully there, and that he is justly entitled to compensation for this as his other time, is conceded by the default in that action. The service in this instance was in remaining with those for whom he was laboring, at their instance, and for their benefit.

The defendant must be defaulted for the value of the masts sold to pay the judgments in favor of Samuel Nash and Royal F. Nash.

STATUTORY LIEN FOR LABOR ON LUMBER does not extend to expenses incurred in getting into the woods. When the owner negligently intermingles lumber cut by different crews of workmen, the lien of each laborer will be upon the whole mass: *Spofford v. True*, 54 Am. Dec. 621.

LIEN FOR SERVICES: See this subject discussed in the note to *McIntyre v. Carver*, 37 Am. Dec. 519, 522.

VOID PROCESS NO PROTECTION TO OFFICER: See *State v. McNally*, ante, p. 650, and note citing prior cases.

BANGOR v. WARREN.

[34 MAINE, 324.]

VOLUNTARY CONVEYANCE WITHOUT CONSIDERATION CAN NOT BE AVOIDED BY GRANTOR'S CREDITORS, who become so subsequent to the record of the deed, by merely proving his insolvency at the time of the conveyance.

NEGOTIABLE DRAFT TAKEN FOR PRE-EXISTING DEBT IS PAYMENT THEREOF.
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CONDITIONS IN DEED CAN BE RESERVED ONLY FOR GRANTOR AND HIS HEIRS, and the right of re-entry for a breach pertains to the grantor and his legal representatives alone.

RIGHT OF ENTRY FOR BREACH OF CONDITION IN DEED CAN NOT BE TAKEN IN EXECUTION by the grantor's creditor, under the Maine statute allowing creditor to take in execution "all rights of entry into land" of his debtor. The rights of entry subjected to execution by the statute are confined to those cases where the debtor has been ousted or dispossessed of a freehold.

DELAY BY CREDITOR IN LEVYING EXECUTION FOR HIS DEBT, for purpose of allowing prior creditors to attach, can not affect the question of his right to property levied on.

DEED CAN BE AVOIDED ON GROUND THAT GRANTEE WAS NOT LEGALLY AUTHORIZED to receive it, only by the grantor or by some one privy in estate.

WRIT of entry by the city of Bangor against Warren, the tenant, to recover a tract of land granted to demandants by Philip Coombs and others, for the express consideration of one dollar. The deeds from Coombs to Orin Favor and others, mentioned at the end of the opinion, were introduced by the demandants, under objection, to meet the allegation of the fraudulency of their deeds based on the ground of no consideration. The deeds were of property immediately about the common, for the consideration of a certain price per lot. And in connection with the deeds, a contract of one of the grantees was introduced, in which he agreed to pay that price per lot upon condition that the common should be granted to the city to be forever used as a public common. The case is otherwise sufficiently stated in the opinion. Verdict *pro forma* for the demandants, and the tenant excepted.

Cutting, for the tenant.

Wakefield, city solicitor, for the demandants.

By Court, TENNEY, J. The city of Bangor claims the premises by virtue of a deed from Philip Coombs, Philip H. Coombs, and others, dated March 26, 1835, accepted by a vote of the board of aldermen, and of the common council, on April 11, 1835, and recorded February 24, 1836, upon the condition that the premises be inclosed as a common and be kept by the city, unintersected by roads, for the proper use of the public forever.

The tenant derives his title from the levy of certain executions against Philip Coombs and Philip H. Coombs, issued upon judgments rendered in actions against them on certain drafts,

all bearing date subsequently to the execution and delivery, and the registration of the deed to the city. And he offered to show that at the time of the conveyance of Philip H. Coombs and Philip Coombs to the city, they were actually insolvent, as proof of constructive and legal fraud; and it was at the same time stated by the tenant's counsel that they should offer no other evidence of fraud of any description. And they offered to show further that the bill of exchange for the recovery of which one of the actions was brought that resulted in a judgment, for the satisfaction of which a levy was made, was the renewal of paper, which originated some time in the year 1835. The evidence so offered, on being objected to, was excluded.

Assuming that the deed of the tenant's debtors was a voluntary conveyance, and wholly without consideration, can the tenant avail himself of this fact, to avoid the deed, on proof that these persons, who were grantors therein, were insolvent at the time when they executed the deed? The doctrine of the law is too well settled upon this point to need further discussion. This court gave full consideration to the question in the case of *Howe v. Ward*, 4 Greenl. Ev. 195; and in *Clark v. French*, 23 Me. 221 [39 Am. Dec. 618]; and the principles announced in each have been uniformly adhered to in this state.

But it is insisted that in one of the judgments the tenant is to be treated as an attaching creditor before the constructive notice to him in the record of the deed to the city, inasmuch as the foundation of that judgment was a draft for paper originating anterior to that time. This draft on which the action was commenced was negotiable, and where such have been taken for a pre-existing debt, it has been held in this state and in Massachusetts that the prior debt was thereby paid.

The tenant offered a lease of the premises made by authority of the city to Sayward and Wingate, dated May 16, 1839, and the consequent occupation by the lessees under it, by fencing up and excluding all ingress and egress to or from the premises, as evidence of the non-performance of the condition in the deed, prior to the tenant's levies, and therefore, that the premises were thereby forfeited. This evidence was not admitted.

The condition is manifestly subsequent in its character, and this is admitted by the tenant's counsel. And "it is a rule of the common law, that none may take advantage of a condition, but parties and privies in right and representation as heirs, executors, etc., of natural persons, and the successors of politic persons; and that neither privies nor assignees in law, as lords

by escheat, nor as grantees of reversions, nor privies in estate, as he to whom a remainder is limited, shall take the benefit of entry or re-entry by force of a condition:" 1 Shep. Touch. 149. Chancellor Kent remarks, that "conditions can only be reserved for the grantor and his heirs. A stranger can not take advantage of the breach of them. There must be an actual entry, for the breach of the condition:" 4 Kent's Com., sec. 56; Stearns on Real Actions, 24.

But the counsel for the tenant contends that as a creditor may take in execution for his debts, among other things, "all rights of entry into land" of his debtor, R. S., c. 94, sec. 1, the levy upon the premises was effectual to pass the right of entry on the ground of a forfeiture for the breach of the condition in the deed, to the tenant, as a creditor, and his subsequent actual possession has made perfect to him the title in the premises.

The right of entry referred to, in the statute relied upon, is undoubtedly the first and most simple remedy for one who has been ousted or dispossessed of a freehold. It is for the purpose of revesting an estate of which the claimant or his ancestor or predecessor has been unlawfully deprived, and is different in some respects from the right or title of entry for a forfeiture on breach of a condition: Jackson on Real Actions, 1, 2. Such an entry is defined to be "an extra judicial and summary remedy against certain species of injury by ouster, used by the legal owner, when another person, who has no right, has previously taken possession of the lands or tenements:" 2 Jacob's Law Dict. 380. It is unlike the entry where one entitled wishes to take advantage of a breach of a condition in the deed; in which case the entry is essential to the title of the claimant, and the time when it is to be made will depend much upon the instrument or contract by which it is reserved: *Id.*; Stearns on Real Actions, 25. The last species of entry is usually denominated an entry or re-entry for a forfeiture on breach of a condition.

The statute gives the right to the creditor to levy his execution upon "all rights of entry" in the land of the debtor, in the manner mentioned in this chapter. And it is provided in the eighteenth section of chapter 94, "when an execution is levied on land into which the debtor has, or is supposed to have, the right of entry, and of which any other person is then seised, the officer shall deliver to the creditor a momentary seisin and possession of the land, so far as to enable the creditor to maintain an action therefor in his own name and on his own seisin." It is evident from this section that the entry before referred to

is that entry to which a party who has been disseised, or one who succeeds to his place, has a right, in order to regain that possession which has been usurped by one who had no right to the land.

The statute contains no provision by which a creditor can, by a levy of his execution upon land conveyed by his debtor in a deed containing a condition subsequent, acquire the rights of the grantor, and claim the estate for a breach of the condition. And it can not be admitted that so important a change as that contended for in behalf of the tenant, in the common law, would follow from the provision that "all rights of entry into lands" of the debtor may be levied upon by his creditor. On the construction contended for, the right would exist, without any remedy expressly provided by which it could be enforced and made available.

The evidence offered to show that the tenant's levies were delayed for the purpose of allowing prior attaching creditors to levy on demands existing previous to the conveyance to the city, and that such creditors did levy upon large portions of the lands of Philip Coombs and Philip H. Coombs, could have no legitimate effect upon the case. We are to look only to the premises on which the tenant made his levy, and determine whether he was a creditor, prior or subsequent to the record of the deed thereof to the city; and the rights of neither party can be affected by such delays, and the levies made by other creditors.

It is contended that the deed to the city is void, because the city was not legally authorized to receive it, coupled with a condition that the premises should be inclosed as a common. It is denied that the city can make an appropriation to inclose a common. This is a point which was not raised at the trial, and can not now with propriety be considered. The city charter and by-laws are not referred to in the case, and we can not decide that the city have not the authority to inclose a parcel of land for a city common. But in this question the tenant has no lawful interest, because such a deed is good until avoided by the grantor himself or by some one privy in estate: *Inhabitants of Worcester v. Eaton*, 13 Mass. 371 [7 Am. Dec. 155].

The deeds from Coombs to Orin Favor and thirteen others were admitted in evidence for the city, against the objection of the tenant, and also the contract executed by Amos M. Roberts and others. The decision of the case against the tenant has been put upon other grounds than that which would render this

evidence material. These documents could have had no effect whatever upon the verdict as it was directed to be rendered, and the tenant was not injured thereby.

Exceptions overruled. Judgment on the verdict.

HOWARD, J., took no part in this decision.

NEGOTIABLE INSTRUMENT AS PAYMENT OF PRE-EXISTING DEBT: See *Mellege v. Boston Iron Co.*, 51 Am. Dec. 59, and cases cited in the note.

VOLUNTARY CONVEYANCE, VALIDITY OF: See *Choteau v. Jones*, 50 Am. Dec. 460, and note citing prior cases; *Howe v. Waysman*, 49 Id. 126, and note; *Dodd v. McCraw*, 46 Id. 301. Such conveyance is not void as to subsequent creditors, unless there be some extraneous evidence of fraud: *Cosby v. Ross' Adm'r*, 20 Id. 140. See *Lancaster v. Dolan*, 18 Id. 625.

BREACH OF CONDITION SUBSEQUENT CAN BE TAKEN ADVANTAGE OF only by grantor, his heir or legal representatives, or in case of a corporation, the successor of the grantor: *Cross v. Carson*, 44 Am. Dec. 742, and note 758. The principal case is cited to this point in *Hooper v. Cummings*, 45 Me. 366, and to the point that the Maine statute, R. S., c. 94, sec. 1, has not changed that rule. *Guild v. Richards*, 16 Gray, 318, holds, citing the principal case, that the grantor can not convey his right of entry for the breach of the condition to a stranger.

ONLY PARTIES TO DEED CAN QUESTION ITS INTENT OR VALIDITY: *McCullough v. Wall*, 53 Am. Dec. 715.

STOCKBRIDGE v. CROOKER.

[34 MAINE, 349.]

PERSON WHO PERFORMS HIS SERVICES FAITHFULLY AND WITH COMPETENT SKILL is not, as a matter of law, entitled to less compensation than another of more learning and skill who could perform the same services no better.

JURORS MAY CONSIDER, IN AWARDING COMPENSATION FOR SERVICE, exhausting studies, time consumed, and expenses incurred in acquiring great professional knowledge and distinction, or great mechanical or other skill; but they are not bound to award a sum commensurate with the skill exhibited and the responsibility incurred, and an instruction to the latter effect is erroneous.

ASSUMPSIT for value of professional services rendered by plaintiff as a surgeon. The operation, a critical one, had been performed by the plaintiff and another upon the skull of the defendant's child that had been struck by a falling weight.

Gilbert, for the defendant.

Tallman, for the plaintiff.

By Court, SHEPLEY, C. J. The jury were instructed "that the

plaintiff was entitled to recover for the service a sum commensurate with the labor performed, the skill exhibited, and the responsibility incurred by him in the matter."

These were proper subjects for consideration by the jury while they were determining what would be a reasonable compensation for the professional services performed.

The law allows a reasonable compensation, and permits the jury to take into consideration all the facts. The same rule of law decides the compensation to be made for services, whether performed by a day-laborer or by a mechanic or by a surgeon. It does not enter into distinctions so nice as to determine, as matter of law, that a mechanic who performs his services faithfully and with competent skill is not entitled to receive as much compensation therefor as another would be who had acquired much greater skill and had performed like services no better. Or that a surgeon who had performed an operation skillfully and faithfully would not be entitled to receive the same compensation as one more learned and skillful who could perform the same operation no better.

While the law does not act upon such distinctions, it permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred to acquire great professional knowledge and distinction, or great mechanical or other skill.

If the law made the compensation for services performed commensurate with the skill exhibited and the responsibility incurred, it would be necessary to admit testimony in such case to prove how much skill had been exhibited and how great responsibility had been incurred.

It would often be difficult, if not impossible, to receive such testimony in such a manner that a jury could safely act upon it.

The rule stated would tend greatly to impair uniformity of compensation for professional and mechanical services of the same description, and to introduce a different rule of compensation for like services when performed by different individuals.

Exceptions sustained, verdict set aside, and a new trial granted.

HAPGOOD v. FISHER.

[34 MAINE, 407.]

MERE FACT THAT PART OF CONSIDERATION FOR CONVEYANCE OF PROPERTY BY DEBTOR is a contract for his future support does not render it void.

CONVEYANCE BY DEBTOR, PART OF CONSIDERATION OF WHICH is a contract by grantee for debtor's future support, is not void if debtor retains sufficient property to pay his debts at the time of the conveyance; if not, it would be void.

DEPOSITION THAT WITNESS'S REPUTATION FOR TRUTH IS "NOT VERY GOOD" can not be excluded because deponent stated on cross-examination that such reputation was founded on his not fulfilling his agreements.

ASSUMPSIT for the value of certain cattle. The cattle had been attached as the property of David Fisher and an accountable receipt given to the attaching officer. This action is upon the accountable receipt. The defense was that the property did not belong to David Fisher, for the reasons stated in the opinion. The testimony of Increase Fisher was contained in a deposition, to one of the interrogatories in which he replied that the reputation of one of the plaintiff's witnesses was "not very good." On cross-examination, he deposed that the complaint against the witness was that he did not fulfill his agreements. Exceptions were taken to the admission of these parts of the deposition, and to the refusal of the court to charge as requested.

D. T. Granger, for the plaintiff.

Fuller, for the defendants.

By Court, WELLS, J. The question of fact tried by the jury was whether the property attached belonged to David Fisher, the debtor, or his son David Fisher, jun. It was sold by the father to the son in 1832, and was attached as the property of the father in 1840, to secure a debt, which originated in 1831. A part of the consideration of the sale was to be paid in supporting the father for a limited period, and a part in the payment of his debts.

The judge was requested to instruct the jury "that if they should be satisfied that it was a part of the arrangement between D. Fisher and D. Fisher, jun., that the property should be paid for in supporting the father, the purpose being in part to secure the maintenance of the father, he being indebted, the transfer would be void."

The requested instruction does not embrace an inquiry into the effect of a conveyance merely voluntary, where there is no valuable consideration. Whether such a conveyance should be regarded as absolutely void in law, or only *prima facie* fraudulent and open to explanation, against prior creditors, is a question upon which the authorities are not in harmony: *Reade v.*

Livingston, 3 Johns. Ch. 481 [8 Am. Dec. 520]; *Hinde v. Longworth*, 11 Wheat. 199; *Seward v. Jackson*, 8 Cow. 406; Story's Eq. Jur., sec. 354 et seq. But the request is based upon the ground that a part of the consideration was the future support of the father. That would not be a voluntary consideration, but a valuable one to be paid by the grantee. Then the question would arise whether the conveyance was made in good faith towards the creditors of the grantor. The consideration might be in part to secure the support of the grantor, and he might be indebted, and still the conveyance be good. The existence of these facts alone would not necessarily render it void. For the owner of property has the right to dispose of it as he may think proper, if he does no wrong to his creditors. And if he should retain property amply sufficient for the payment of all his debts, he would have an undoubted right to contract for his future support for a longer or shorter period. If a man in solvent circumstances should sell a part of his property, and agree to receive the price in board, the law would not declare the contract fraudulent and void against an existing creditor.

When one sells property to create a fund for his maintenance, without reserving sufficient means to pay his existing debts, such conduct is so manifestly unjust that he is evidently guilty of an actual fraud. Such an act would fall within the 13 Eliz., c. 5; "the end, purpose, and intent to delay, hinder, or defraud creditors," would be quite apparent. But if he retains an abundance of property to discharge all his obligations, the sale could not be considered as a fraud in law. The jury must settle the question of fraud by an examination into all the facts and surrounding circumstances.

In *Twyne's Case*, 3 Co. 82, it is said that "when a man, being greatly indebted to sundry persons, makes a gift to his son or any of his blood, without consideration, but only of nature, the law intends a trust between them, *scil.*, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father and cousin, and not see him want, who had made such gift to him," etc.

In *Smith v. Smith*, 11 N. H. 460, it is said by Parker, C. J.: "It is an attempt to secure to the grantor a support during life out of his property, to the prejudice of his creditors. Any person who takes such conveyance should take care that the existing debts of the grantor are paid, etc. Or at least, show that full means for that object were left in the possession of the

grantor, which the creditors may levy upon, or have lost by their own negligence." It is not enough to make the transfer void, that it was "in part to secure the maintenance of the father, he being then indebted." For he might have had sufficient property besides that conveyed to pay all his debts; it might have been to a large amount, and the debt have been small. The terms of the requested instruction can not be changed by an examination of the facts which were presented to the jury. The propriety of it must be determined by its own language.

The testimony elicited upon the cross-examination of Increase Fisher showed that the reputation of David Blanchard for truth and veracity related to his not fulfilling his agreements. The judge could not properly exclude the testimony in chief, which was admissible as responsive to the general question, and the jury had the right to judge of it in connection with the subsequent explanation.

No objections are made to the instructions which were given.

SHEPLEY, C. J., RICE, HATHAWAY, and APPLETON, JJ., concurred.

Exceptions overruled.

IMPEACHING WITNESS MAY BE ASKED ON CROSS-EXAMINATION from whom he received information of character of witness impeached: *Weeks v. Hall*, 50 Am. Dec. 249, and note citing prior cases.

SECRET TRUST AS EVIDENCE OF FRAUD IN DEED: See *Oriental Bank v. Haskins*, 37 Am. Dec. 140, and note citing prior cases. In *Barker v. Osborne*, 71 Me. 71, it is held, citing the principal case, that a conveyance retaining provision for future support of the grantor is not necessarily fraudulent; but if the debtor had no other property, the grantee would be chargeable as trustee to the prior creditors to the extent of the surplus above the amount due him.

YARMOUTH v. NORTH YARMOUTH.

[34 MAINE, 411.]

ASSENT OF TOWN TO LEGISLATIVE ACT, DELIVERING PORTION OF ITS PROPERTY to trustees, may be presumed from its long acquiescence and its receipt, without objection, of the income under the provisions of the act.

PUBLIC CORPORATIONS ARE SUCH AS ARE CREATED FOR PUBLIC PURPOSES ALONE, that are connected with the administration of the government, and whose whole interest and franchises are the exclusive property and domain of the government itself.

LEGISLATURE, WHEN NOT LIMITED BY CONSTITUTION, HAS POWER OVER PUBLIC CORPORATIONS to impose, without infringing on private rights, such modifications, extensions, or restraints as the general interests and public exigencies may require.

PRIVATE CORPORATIONS EXIST BY LEGISLATIVE GRANTS CONFERRING POWERS, rights, and privileges for special purposes, and embrace all corporations not public.

GRANTS TO PRIVATE CORPORATIONS ARE CONTRACTS, which the legislature can not impair or change without the consent of the corporation.

TRUSTEES INCORPORATED FOR PURPOSE OF INVESTING AND DISBURSING FOR SUPPORT OF PUBLIC SCHOOLS of a town a fund to be created by a sale of the town's property form a private corporation, independent of legislative control, unless on default in the performance of their duties judicially determined.

TRUSTEES HOLDING AS PRIVATE CORPORATION FUND that they are incorporated to expend for public purposes can not be deprived of the fund, or any part of it, by legislative action.

LEGISLATIVE ACT IS UNCONSTITUTIONAL THAT DIVIDES FUND held by private corporation for public school purposes in a certain town between that town and another town created by division of the former.

BILL in equity by the town of Yarmouth against the town of North Yarmouth and the trustees of the school funds in North Yarmouth, seeking what they claim as their proportion of the school fund or of its income held by the trustees. Answers and demurrers were filed, but the demurrers were considered as waived, the parties being desirous of a decision upon the merits. The incorporation of the school trustees and the purposes of their organization are stated in the opinion. The town of North Yarmouth was first divided into North Yarmouth and Cumberland, and pursuant to the act of division a part of the school fund was paid to the town of Cumberland. By an act in 1829 the legislature authorized the trustees to apply the fund still retained in North Yarmouth in each district of the town in proportion to the number of pupils; and the fund was so applied. In 1849 the legislature again divided North Yarmouth, and incorporated the new town of Yarmouth. The fourth section of this act provided that the school fund of North Yarmouth should be divided between the two towns in proportion to the number of pupils in each; that the trustees of the school fund in North Yarmouth who resided within the new town should become the trustees of the fund set off to Yarmouth, with the same powers and duties as the trustees of the North Yarmouth fund, and that they should cease to be trustees of the latter fund. Since the passage of this act none of the fund or of its income had been applied to the Yarmouth schools. Hence this bill.

Barnes, for the plaintiff.

W. P. Fessenden, for the defendants.

By Court, HOWARD, J. The parties expressed a desire at the

argument that this case might be heard and determined as if free from technical difficulties. Yielding to their request, we pass the demurrers to examine the general merits upon the bill and answers. The leading facts are not in controversy.

It seems that the town of North Yarmouth claimed a tract of land called the "school farm," consisting of about two hundred acres, originally appropriated for the use of schools in that town. Whether this was a grant from the proprietors or from the government does not appear. By a special act of the legislature of Massachusetts, of March 3, 1806, certain inhabitants of that town were incorporated as "the trustees of school funds in the town of North Yarmouth;" they and their successors to be and continue a body politic and corporate by that name forever; and to have a common seal, with power to sue and to be sued by that name. The act provided further, that the number of trustees should not be more than eleven nor less than seven, and that they should fill all vacancies occurring in the board, by death, resignation, or otherwise, from the inhabitants of that town, and have power to remove any of their number who might become unfit from any cause for discharging their duties as trustees. They were authorized and empowered by the same act to sell the "school farm," so called, consisting of two hundred acres, more or less, belonging to said town of North Yarmouth, which was originally appropriated for the use of schools, and to put out at interest the money arising from such sale, in manner hereinafter mentioned, and for that purpose." They were to "sell and convey in fee simple," and place the proceeds on interest, and to invest the interest with the principal until the annual income should be three hundred dollars, and then to apply that sum "towards the annual support of public schools in said town, to be appropriated among the several school districts in said town in proportion to what they pay of town taxes. And it shall never be in the power of said town or trustees to alter or alienate the appropriation of the fund."

The trustees accepted the trust, conveyed the land, received the proceeds, and have had the exclusive possession and management of the funds. Whether the town assented does not directly appear, but it may fairly be presumed from their long acquiescence, and receiving the income under the provisions of the act without objection, that they assented to its passage: *Lanesborough v. Curtis*, 22 Pick. 320. The act of 1821, providing for the incorporation of Cumberland from a portion of North Yarmouth, and for a division of the school funds, and

the act of 1829, authorizing the trustees to appropriate the income of the funds before the annual amount was three hundred dollars, do not affect the principles of this decision.

We assume, then, that the trustees of the school funds in North Yarmouth were legally incorporated, and that they have performed their duties according to the terms of their charter in raising, investing, managing, and in exclusively possessing and controlling the funds, in pursuance of the objects for which they were incorporated, until the passage of the act of incorporation of Yarmouth, August 8, 1849, c. 264. This is admitted, or assumed at the argument. Indeed, the complainants proceed upon this assumption.

The plaintiffs claim a portion of these school funds, according to the provisions of the fourth section of their act of incorporation. The defendants resist the claim, upon the ground that the funds were not within the control or direction of the legislature, and that the fourth section, which provides for the division of the funds, is unconstitutional and void. It is not pretended that either North Yarmouth or the trustees assented to the provisions of that section, but they seem to have resisted them throughout. Were they binding upon the trustees? and could the legislature authoritatively require them to divide the funds thus intrusted, and deliver them to others? This brings us to the consideration whether the trustees were constituted a public or a private corporation.

(The distinction between public and private corporations has reference to their powers and the purposes of their creation. They are public when created for public purposes only, connected with the administration of the government, and where the "whole interests and franchises are the exclusive property and domain of the government itself." Over these the legislature has power, not limited by the constitution, to impose such modifications, extensions, or restraints as the general interests and public exigencies may require, without infringing private rights. All corporations invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control. All other corporations are private. They exist by legislative grants conferring powers, rights, and privileges for special purposes. These grants are essentially contracts, which the legislature can not impair or change without the consent of the corporation: Co. Lit., sec. 413; Vin. Abr., Corp., A, 2; *Philips v. Bury*, 2 T. R. 346; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Allen v. McKean*, 1 Sumn. 276; *The People*

v. *Morris*, 13 Wend. 325; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224 [33 Am. Dec. 656]; *Story's Com. on Const.*, sec. 1385-1388; *Angell & Ames on Corp.* 9, 27, 28.

The fee of the "school farm" was in the town of North Yarmouth, in trust for the use of schools, in 1806, when the legislature of Massachusetts, by consent of those interested, as we must presume from their entire acquiescence, authorized the sale of the land and the creation of a personal fund from the proceeds, by the trustees then incorporated, in trust for the same use. This fund was never in the town, but was vested, by the act, in the trustees, as a corporation, for the use mentioned, forever. They did not constitute a municipal or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the state, partaking the nature of a contract, which they accepted, and in which the government had no interest. This was a franchise, which involved the right to possess and control property, and the right to perpetuate a corporate immortality: 2 Bla. Com. 37. Though springing from the grant, the franchise and the rights flowing from it were no more subject to the control or interference of the legislature than were private rights of property, unless on default of the corporation, judicially determined: 2 Kent's Com. 306. *Trustees of the New Gloucester School Fund v. Bradbury*, 11 Me. 118 [26 Am. Dec. 515], is a case similar to this at bar, and directly in point; *Richardson v. Brown*, 6 Id. 355; *Terrett v. Taylor*, 9 Cranch, 43; *Pawlet v. Clark*, Id. 292.

The act relating to the separation of this state from Massachusetts provides that "all grants of lands, franchises, immunities, corporate and other rights, etc., shall continue in full force" after Maine shall become a separate state. The first section of that act, embracing the provisions referred to, forms a part of our constitution, art. 10, sec. 5, cond. 7: Act of Massachusetts, June 19, 1819. The statute of this state, of February 19, 1831, c. 492, sec. 1, to which the legislature of Massachusetts gave its consent, so far altered the terms and conditions of the act relating to the separation of the states "that the trustees of any ministerial or school fund incorporated by the legislature of Massachusetts in any town within this state shall have, hold, and enjoy their powers and privileges, subject to be altered, restrained, extended, or annulled by the legislature of Maine, with the consent of such trustees and of the town for whose benefit such fund was established." In this case there was no consent.

It follows that the "trustees of the school funds in North Yarmouth" constituted a private corporation; that they can hold and enjoy their rights and privileges under their charter, independent of legislative interference or control, except for causes which do not now appear; and that so much of the fourth section of the act to incorporate the town of Yarmouth as provides for the division of "the school funds belonging to the town of North Yarmouth" is inoperative and void. The constitution is imperative that the legislature shall pass no law impairing the obligation of contracts: Const. Maine, art. 1, sec. 11; Const. U. S., art. 1, sec. 10, cl. 1.

This result renders further consideration of the merits or of the objections unimportant.

SHEPLEY, C. J., TENNEY, WELLS, and APPLETON, JJ., concurred.

Bill dismissed, with costs for defendants.

ACCEPTANCE OF LEGISLATIVE AMENDMENT TO CORPORATE CHARTER: See extensive note to *Commonwealth v. Cullen*, 53 Am. Dec. 460-473.

POWER OF LEGISLATURE OVER PUBLIC CORPORATION: See note to *Commonwealth v. Cullen*, 53 Am. Dec. 470 et seq.

CHARTER OF CORPORATION IS CONTRACT NOT TO BE IMPAIRED by legislative amendment without consent of corporation: See *Commonwealth v. Cullen*, 53 Am. Dec. 450; *Brown v. Hammel*, 47 Id. 431; *Monongahela Nav. Co. v. Coon*, Id. 474, and notes citing prior cases.

CORPORATION FOR DISTRIBUTION OF PUBLIC MONEY FOR EDUCATIONAL PURPOSES is a private corporation: *Montpelier Academy v. George*, 33 Am. Dec. 585; *Regents v. Williams*, 31 Id. 72.

PUBLIC CORPORATION, WHAT IS: See *Regents v. Williams*, 31 Am. Dec. 72; *Ten Eyck v. D. & R. Canal Co.*, 37 Id. 232, and note citing prior cases.

THE PRINCIPAL CASE IS CITED in *Wrentham v. Norfolk*, 114 Mass. 562, to the point that school lands and funds are generally regarded as corporate property of the town, and usually divided by the legislature when the town is divided.

LITTLE v. FOSSETT.

[34 MAINE, 545.]

BAILEE MAY RECOVER COMPENSATION FOR ANY CONVERSION of or injury to the property bailed while in his possession.

BAILEE MAY RECOVER VALUE OF PROPERTY BAILED, or damages commensurate with the injury sustained, in an action against a stranger for its conversion or injury; but his damages are limited to his special interest in an action against the general owner.

TRESPASS for damages to a wagon and harness. Plaintiff hired a wagon and harness, and while traveling along the road the

defendant negligently drove against the vehicle, which, together with the harness, was thereby injured. The defendant requested the instruction that if the plaintiff did not own the articles, but had mere temporary possession, he could not recover for a permanent injury done them. The instruction was refused, and the defendant excepted.

Lowell, for the defendant.

Kennedy, for the plaintiff.

By Court, APPLETON, J. The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. The longer or shorter period of such bailment, the greater or lesser amount of compensation—and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan does not seem to affect the question. “The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer:” 2 Kent’s Com. 574. By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right: Story on Bail., sec. 394. In *Croft v. Alison*, 4 Barn. & Ald. 590, the court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In *Nicolls v. Bastard*, 2 Crompt. M. & R. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee’s possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. “If,” say the court, in *White v. Webb*, 15 Conn. 305, “the suit is brought by a bailee or special propertyman against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the

property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of authority: *Lyle v. Barker*, 5 Binn. 457; *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Chesley v. St. Clair*, 1 N. H. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

MEASURE OF DAMAGES WHEN BAILEE SUES FOR CONVERSION OF PROPERTY BAILED: See *Harker v. Dement*, 52 Am. Dec. 671, and extensive note; *Wilson v. Little*, 51 Id. 307, and note.

BAILEE MAY MAINTAIN TRESPASS: *Woodruff v. Halsey*, 19 Am. Dec. 329; *Root v. Chandler*, 25 Am. Dec. 546.

THE PRINCIPAL CASE IS CITED in *Johnson v. Holyoke*, 105 Mass. 81, to the point that the extent of the bailee's liability to the bailor does not affect the liability of a third party by whose unlawful act or neglect the property bailed has been injured.

LIME ROCK BANK v. MALLETT.

[34 MAINE, 547.]

PARTY SIGNING NOTE AS MAKER MAY BY EXTRINSIC EVIDENCE SHOW, whenever it is material, that he signed as surety, and that this was known to the party suing on the note.

HOLDER OF PROMISSORY NOTE EXTENDING TIME OF PAYMENT TO MAKER by contract, upon sufficient consideration, discharges an apparent maker that he knows to be a surety, and whose consent to the extension has not been given.

INDORSEMENT, "RECEIVED, RENEWED," WITH DATE ATTACHED, MADE BY HOLDER, means that the interest for a renewal has been received, and that the note is to be the same as if made in the same terms anew from that date.

PAYMENT OF INTEREST IN ADVANCE IS CONSIDERATION sufficient to support agreement for further credit.

SURETY ON PROMISSORY NOTE IS DISCHARGED BY BINDING EXTENSION OF TIME given to the maker by the holder, without the surety's consent, although he may have consented to a previous contract of the same kind.

ASSUMPSIT on a promissory note dated January 28, 1845, and payable in sixty days from date. The note contained indorsements dated the twenty-eighth day of May, September, and November respectively, in the year 1845, and the same day of January, March, May, and July respectively, in the year 1846. Attached to each indorsement were the words, "received, re-

newed." Hewett, the plaintiffs' witness, testified that during his directorship of the Lime Rock Bank, Mallett applied to him for a still further delay in payment of the note, saying: "It has already stood too long. It should be taken care of. Arrangements have been or will be made for its payment." Verdict for the plaintiffs, and exceptions to the instructions taken by the defendant. The opinion in other respects sufficiently states the case.

Lowell and Foster, for the plaintiffs.

M. H. Smith and Gould, for the defendant.

By Court, RICE, J. This is an action on a joint and several promissory note, dated January 28, 1845, payable to the president, directors, and company of the Lime Rock Bank, or their order, and signed, Henry McIntosh, John L. Mallett, and John Spofford. The names of all the makers appear as principals on the face of the note.

It is contended by the defendant, that notwithstanding his name thus appears on the note as a principal, still as matter of fact he was only surety to McIntosh, and that this fact was well known to the bank at the time the note was made. He further insists that, in consideration of the payment of interest in advance by McIntosh, the note had been at several different times renewed, and the time of payment extended by the plaintiffs, without his knowledge or consent, and that in consequence thereof he is discharged from all liability to pay the same.

Though there formerly may have been some doubt whether a party, whose name appeared upon a note without anything to indicate that he sustained any relation other than that of principal, could, at law, be permitted to prove *aliunde* that he was surety only, the rule is now well established that, whenever it is material, a defendant may show by extrinsic evidence that he made the note as a surety only, and that it was known to the plaintiffs that he was only surety: *Carpenter v. King*, 9 Met. 511 [43 Am. Dec. 405]; *Grafton Bank v. Kent*, 4 N. H. 221 [17 Am. Dec. 414]; *Artcher v. Douglass*, 5 Denio, 509; *Branch Bank v. James*, 9 Ala. 949; *Mariner's Bank v. Abbott*, 28 Me. 280; *Bank of Steubenville v. Hoge*, 6 Ohio, 17.

The law is equally well settled that, when the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged: *Bank v. Abbott*, 28 Me. 280; *Leavitt v. Savage*, 16 Id. 72; *Hutchinson v. Moody*, 18 Id. 393.

The judge instructed the jury that the words of the indorsement, "received, renewed," might fairly be considered as meaning, received the interest for a renewal; and "renewed" might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date.

This would seem to be the only meaning that could be legitimately assigned to these words, and with that instruction there is no complaint from either party. The payment of interest in advance, though it has been held by this court not to be of itself sufficient evidence of an agreement to give further credit, is undoubtedly a good consideration for such an agreement: *Bank v. Abbott, supra*; *Grafton Bank v. Woodward*, 5 N. H. 99 [20 Am. Dec. 566]; *Bailey v. Adams*, 10 Id. 168; *New Hampshire Sav. Bank v. Ela*, 11 Id. 335.

If, under the instructions given, the jury found that the defendant was only a surety on the note (and there was evidence tending to prove that such was the fact), the only remaining facts to be determined by them was whether these renewals had been made at the request or with the consent of the defendant.

On this point the judge instructed the jury that if satisfied that the first renewal or extension of time for payment was made at the request or with the consent of the defendant, the plaintiff would be entitled to the verdict.

To this instruction the defendant objects. The jury having been instructed as to the effect of the several indorsements, that they were to be treated as renewals of the subsisting note, at the times they were severally made, we are unable to perceive any reason why the same rule should not apply to each of the subsequent indorsements that was applied to the first. Such would undoubtedly be the case.

It is contended, however, that there were subsequent instructions given by the court, by which those objected to were so qualified and explained that the jury could not have been led into error. The language relied upon thus to qualify the objectionable instructions immediately follows, and is in these words, "that if satisfied that the defendant stated to Hewett that he knew the note had stood too long, they would consider whether he had not known it from the time of the first renewal or extension, and assented to it."

In the first instance, the judge lays down a distinct proposition to the jury, the finding of which by them in the affirmative would entitle the plaintiffs to a verdict, to wit, if the defendant should have requested or consented to the first renewal.

Then follow instructions to the jury directing them to consider whether the testimony of the witness Hewett would not justify them in drawing certain inferences of fact, to wit, whether the defendant had not known from the time of the first renewal or extension, and assented to it. These last instructions were certainly appropriate, and had the judge proceeded and instructed the jury what would have been the effect of finding such request or consent on the part of the defendant, the jury would not have been liable to fall into error in consequence of the too great restriction in the instruction, to which objection was taken. This, so far as appears from the report of the case, he omitted to do. The jury might consistently with the instructions have rendered a verdict for the plaintiff, though satisfied that all the renewals subsequent to the first were made without the request or consent of the defendant. Indeed, they could hardly have come to a different result. Such a conclusion, under such circumstances, would have been in violation of well-settled principles of law. We think the jury were too much restricted in the application of the facts that they were authorized to find.

The exceptions are therefore sustained, and a new trial granted.

TENNEY, HOWARD, and APPLETON, JJ., concurred.

MERE DELAY OR INDULGENCE, NOT FOUNDED ON VALUABLE CONSIDERATION, does not discharge surety: *Carter v. Jones*, 49 Am. Dec. 425, and note citing prior cases; *Pintard v. Davis*, 47 Id. 172, and note.

EXTENSION FOR DEFINITE LENGTH OF TIME, FOUNDED ON VALUABLE CONSIDERATION, without surety's consent, discharges him: *King v. State Bank*, 43 Am. Dec. 739, and cases cited in the note. Giving further time to maker of note pursuant to an agreement will discharge the surety: *Kennebec Bank v. Tuckerman*, 17 Id. 209.

PAYMENT OF INTEREST IN ADVANCE IS SUFFICIENT CONSIDERATION FOR FORBEARANCE to principal debtor, and will discharge the surety. The principal case is cited to this point in *Abel v. Alexander*, 45 Ind. 531. But it is not in itself evidence of such an agreement: *Jennings v. Chase*, 10 Allen, 527, citing the principal case.

THE PRINCIPAL CASE again appeared before this court, and is reported in 42 Me. 349.

O'BRIEN v. GILCHRIST.

[34 MAINE, 554.]

RECEIPT MAY BE CONTRADICTED BY PAROL EVIDENCE.

BILL OF LADING IS RECEIPT SO FAR AS REGARDS CONDITION AND QUANTITY of the goods shipped, and though *prima facie* evidence of a high nature, may be controlled in this respect by parol evidence, at least as between the shipper and the carrier.

BILL OF LADING IS BOTH RECEIPT FOR GOODS and contract to carry and deliver them.

CARRIER MAY SHOW THAT HE DID NOT RECEIVE QUANTITY OF GOODS receipted for in a bill of lading, when sued for the deficiency by the shipper.

WORDS "MORE OR LESS," IN BILL OF LADING that states the shipping of a certain number of pieces of lumber amounting to specified number of tons, "more or less," can not be shown by parol to have been intended by the parties to refer also to the number of pieces.

THIS was an action by Seth O'Brien against the master of the schooner Grecian to recover for the deficiency of lumber existing between the amount delivered by the defendant at the port of delivery and the amount which he stated in the bill of lading to have been shipped on his vessel. The bill of lading, signed by the defendant, stated that O'Brien shipped upon the schooner, at the port of King William, Virginia, "three hundred and seventy-eight pieces of white oak ship-timber, amounting to one hundred and thirty-four tons and thirty-two feet, more or less, and are to be delivered in the like good order and condition at the said port of East Thomaston, Maine." When the timber was delivered at East Thomaston there were only three hundred and fifty-one pieces, amounting to one hundred and twenty-three tons. Against the objection of the plaintiff, the defendant was allowed to introduce testimony as follows: All the timber received was delivered. After the timber had been received on board the plaintiff brought the bill of lading to the defendant for his signature; but the defendant objected to the amount there stated, as it did not agree with the account of the lumber received that he himself had taken. And the plaintiff inserted the words "more or less," and agreed, as the defendant still objected that they applied only to the number of tons, that they should apply also to the number of pieces, and the defendant then signed the bill. The jury were instructed: 1. That the bill of lading, as far as it acknowledged the receipt of a certain quantity of lumber, was a receipt, and though evidence of a high character of the truth of its recitals, was nevertheless open to contradiction by extrinsic evidence; 2. That the words "more or less," by the legal construction of the instrument, applied only to the number of tons, and the evidence relating to a parol agreement between the parties that these words should also apply to the number of sticks should be entirely disregarded, as far as it might control the legal construction of the instrument. The jury could consider this evidence only as it should touch the question

whether the number of sticks of timber was erroneously stated or not.

Gould and Ruggles, for the plaintiff.

Lowell and Foster, for the defendant.

By Court, APPLETON, J. That a receipt may be contradicted by parol evidence has long been considered well-settled law. The bill of lading, so far as regards the condition of the goods shipped, is *prima facie* evidence of a high nature, but not conclusive: *Barrett v. Rogers*, 7 Mass. 297 [5 Am. Dec. 45]. The master of a vessel is not authorized to open the packages to ascertain their condition. The principles of public policy and the convenience of transportation forbid that boxes, bales, etc., should be opened and inspected before receipted for by carriers. They therefore may show that they were damaged before coming into their possession: *Gowdy v. Lyon*, 9 B. Mon. 113. The same rule of law has been applied to the quantity of goods therein stated as having been received for transportation. In *Bates v. Todd*, 1 Moo. & R. 106, Tindal, C. J., said that he was of opinion that, as between the original parties, the bill of lading is merely a receipt liable to be opened by the evidence of the real facts, and left the question for the jury to determine what number of bags of coffee had been shipped. In *Berkely v. Watling*, 34 Eng. Com. L. 22, it was held that the defendants were not estopped by the bill of lading to show that goods purporting to be were not in fact shipped. In *Dickerson v. Seelye*, 12 Barb. 102, Edmonds, J., in delivering the opinion of the court, says: "As between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt; that is, as to the quantity of goods shipped and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained." What may be the rights of an assignee under such circumstances, it is not necessary to consider or determine here, as that question does not arise in the present case.

In *Wayland v. Mosely*, 5 Ala. 430 [39 Am. Dec. 335], the court say "that a bill of lading in its character is twofold; viz., a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their condition, etc., it may be contradicted, but in other respects it is treated like other written contracts." In *May v. Babcock*, 4 Ohio, 334, the language of the court is, that "a bill of lading is a contract

including a receipt." The same doctrine in New York is likewise fully affirmed in *Wolfe v. Myers*, 3 Sandf. 7. The best elementary writers also concur in this view of the law: 1 Greenl. Ev., sec. 305; Abbott on Ship. 324. The evidence, so far as relates to this question, was legally admissible, and the instructions of the court in relation thereto were in conformity with well-established principles.

The evidence offered by way of giving a construction to the meaning of the words "more or less," in the bill of lading, was most clearly inadmissible. The court, however, directed the jury entirely to disregard all evidence which was designed to control the legal construction of the instrument, and it is to be presumed that the jury, in rendering their verdict, followed the instructions of the court.

At the same time, the construction of these words, as given in the charge of the judge, was most favorable to the plaintiff.

Exceptions overruled. Judgment on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

BILL OF LADING IS BOTH RECEIPT AND CONTRACT, and as far as it is a receipt may be contradicted by parol: *Wayland's Adm'r v. Mosely*, 39 Am. Dec. 335, citing prior cases in the note. See note to *Chandler v. Sprague*, 38 Id. 409. The principal case is cited to this effect in *Sears v. Wingate*, 3 Allen, 105; *The Delaware*, 14 Wall. 600.

RECEIPTS MAY BE EXPLAINED AND CONTRADICTED BY PAROL EVIDENCE: *Brooks v. White*, 37 Am. Dec. 95, and note citing prior cases; *Tucker v. Baldwin*, 33 Id. 384.

SHUMWAY v. REED.

[34 MAINE, 560.]

GIVING NEGOTIABLE NOTE FOR SIMPLE CONTRACT DEBT is *prima facie* evidence of payment.

LEGAL PRESUMPTION OF PAYMENT ARISING FROM GIVING NEGOTIABLE NOTE for simple contract debt may be overcome by proof that such was not the intent of the parties.

BOND TAKEN AS SECURITY FOR FUTURE INDEBTEDNESS of party overcomes presumption that the party, by giving negotiable notes for subsequent indebtedness, thereby paid the debt.

DEBT on a bond in which the plaintiffs were obligees and Reed and one Tallman the obligors. The bond was given to secure the past and future indebtedness incurred or to be incurred by Reed, who was a trader in Bath, with the plaintiffs, who were merchants in Boston. The bond was conditioned,

that whereas Reed and Tallman were either jointly or severally indebted to Shumway & Snow, and contemplated becoming further indebted to them for goods and cash, that if the past and future debts were paid when due, the bond should be void; otherwise to remain in full force and effect. The plaintiffs introduced notes made by Reed to them, some after and some before the date of the bond, and also three drafts drawn by him upon them after the date of the bond, and paid and taken up by them. They also introduced evidence to show that the notes were given for goods that they had sold to Reed. To all this evidence the defendants objected. The case came up on report from the *nisi prius*.

Paine, for the plaintiffs.

Tallman, for the defendants.

By Court, RICE, J. The bond was given as collateral security for a debt which was due from the defendant Reed to the plaintiffs, and also as security for other debts which the defendants contemplated contracting with the plaintiffs.

So far as the pre-existing indebtedness of Reed is concerned, there is no reason suggested why it should not be secured by the bond. The case finds that the plaintiffs' claim had been forwarded to an attorney for collection, and by him the bond in suit was taken, and in its terms covers that indebtedness.

As to the claim which originated subsequent to the execution of the bond, the defendants contend that they are not liable in this action, because the bond was given only as security for "goods and cash," to be delivered in the future, and because they affirm, for all the goods delivered subsequent to the date of the bond, payment was made by the negotiable promissory notes of Reed.

The rule of law in this state and in Massachusetts is that the giving of a negotiable note is *prima facie* evidence of the payment and satisfaction of a simple contract debt. But this legal presumption is by no means conclusive, but may be rebutted by proof that such was not the intent of the parties.

The simple question for the consideration of the court is whether the facts in the case overcame this presumption. To determine this question, the situation and acts of the parties must be considered. Reed was indebted to the plaintiffs; they were seeking to enforce payment or obtain security; he desired extension of time for payment, and additional credits for goods and cash. For this purpose the bond was given. Now, is it

credible that those plaintiffs, having thus obtained security not only for past indebtedness but for future advances, should immediately thereafter voluntarily and intentionally disregard that security, and rely solely upon the note of the man whose ability to pay they manifestly distrusted? Such a proposition carries improbability on its face. And that improbability is increased by the letters of the parties in the case.

So too as to the drafts; we are of opinion that the situation of the parties and the evidence in the case authorizes the inference that they were paid by the plaintiffs out of their own funds, and not from the funds of the defendants, or either of them.

Whether the conditions of the bond are such as to restrict the credits to be covered by it to "goods and cash" only, is not certain. But as on the other branch of the case we think the plaintiffs entitled to recover, it becomes unnecessary to express an opinion upon that point.

According to agreement, a default is to be entered for the several sums due, as specified in the report, with interest thereon from the time they severally became payable, or by their terms were to draw interest.

SHEPLEY, C. J., and HOWARD and APPLETON, JJ., concurred.

NEGOTIABLE INSTRUMENT AS PAYMENT OF PRE-EXISTING DEBT: See *Bangor v. Warren*, ante, p. 657, and *Melledge v. Boston Iron Co.*, 51 Am. Dec. 59, and prior cases collected in the note.

BUCK v. SWAZEY.

[35 MAINE, 41.]

WHERE PURCHASE IS MADE WITH JOINT FUNDS, AND CONVEYANCE IS MADE TO ONE only of the parties interested in the purchase money, he holds the property in trust for his associate, to the extent of the funds by him advanced.

WHERE NOTES SECURED BY MORTGAGE ARE PURCHASED BY JOINT FUNDS of two persons, and the purchase is taken in the name of one only, a resulting trust arises in favor of the other, to the extent of the funds he has advanced, and this trust is not discharged by a memorandum made by the person taking the legal title, which, after reciting the joint interest of the two, adds that the person taking the title agrees to account and pay to the other one half the sums received on the notes as collected.

MORTGAGE NOTES ARE DEEMED PRINCIPAL and the land is merely accessory thereto.

RESULTING TRUST IN NOTES SECURED BY MORTGAGE ATTACHES TO LAND MORTGAGED to secure their payment, when the mortgage is foreclosed by the person holding the legal title to the notes.

NO RESULTING TRUST CAN BE CREATED BY AFTER ADVANCES, or funds subsequently furnished.

INTEREST IN TRUST ESTATE MAY BE CONVEYED, and the person conveying will be equally compelled to convey when he acquires title, as if the title had been in him at the time of making such contract.

CONTRACT TO CONVEY SPECIFICALLY WILL BE ENFORCED IN EQUITY, though the party may have a remedy at common law.

RESULTING TRUST IS CREATED IN NOTES SECURED BY MORTGAGE where the purchase is made with the joint funds of two persons and the title is taken in the name of but one; and in such a case, if the *cestui que trust* conveys an interest in the property to the plaintiff, a trust is created in his favor which attaches to the land if the mortgage is foreclosed, and the trustee can bring a suit in his own name against the trustee to enforce the trust.

ASSIGNEE OF INTEREST IN TRUST ESTATE MAY MAINTAIN ACTION IN HIS OWN NAME in equity, although he could not maintain such an action at the common law.

ON ASSIGNMENT OF INTEREST IN TRUST ESTATE, the trustee holds the land in trust for the assignee, and a conveyance will be directly enforced from the trustee in his favor, and the conveyance when made will discharge the assignor from so much of his contract as shall thereby have been performed.

ANSWER IS NOT EVIDENCE EXCEPT SO FAR AS RESPONSIVE to the bill; whenever matter in discharge or avoidance is asserted, or new and substantive claims are advanced, they must be established by proof.

BILL in equity. The opinion states the case.

Woodman, for the plaintiff.

A. W. Paine, contra.

By Court, APPLETON, J. From the bill, answer, and proof, it appears that on the twelfth day of September, 1835, one Charles Brown gave three several notes to Charles Trafton, and a mortgage to secure their payment. On the twenty-seventh day of June, 1836, the defendants, Henry Darling and James Swazey, purchased these notes, but the notes and mortgage were transferred to Henry Darling, though the purchase was made with their joint funds. At the same time, Darling gave to his co-defendant Swazey the following memorandum:

“BUCKSPORT, June 27, 1836.

“Received of Charles Trafton three notes of hand, signed by Charles Brown, and dated September 12, 1835, and indorsed by said Trafton, for the following sums: one for two hundred and eighty-three dollars and interest, payable in three months; one for five hundred and forty-one dollars and fifty cents, and interest, in one year; and one for five hundred and forty-one dollars and fifty cents, and interest, in two years. Also an as-

signment of a mortgage deed to said Trafton from said Brown of a lot of land and premises situate in Bangor, for the security of the payment of said notes. This is to certify that James Swazey is equally interested with me in said notes and the security for the payment of the same, and I hereby agree to account and pay the said Swazey one half of all sums of money received on said notes as collected. HENRY DARLING."

On the sixteenth of September, 1836, the defendant Swazey gave the plaintiff an agreement in these words:

"September 16, 1836. I hereby agree and promise to account for and pay Moses G. Buck one sixth part of the amount of three notes of hand, signed by Charles Brown and payable to Charles Trafton, dated September 12, 1835, and indorsed by said Trafton: one for two hundred and eighty-three dollars, and interest, payable in three months; one for five hundred and forty-one dollars and fifty cents, and interest, payable in one year; and one for five hundred and forty-one dollars and fifty cents, payable in two years, and interest. To be paid when received, and in manner as received. JAMES SWAZEY.

"Attest, S. COBB."

In addition to the sixth set forth in the agreement last recited, the plaintiff claims to have conveyed to him the interest in the notes and mortgage specified in the following memorandum, which he claims as assignee by indorsement:

"\$1,025.50.

November 5, 1841.

"Received of George W. Swazey fifty dollars, which was invested in the purchase of three notes (described as above), which I promise to pay him or order his proportion of the proceeds when collected, said notes secured by mortgage of real estate situate in Bangor. The sum invested was ten hundred and twenty five dollars and fifty cents. JAMES SWAZEY.

"Attest, H. DARLING.

Indorsed, GEO. W. SWAZEY."

Brown and Trafton both became insolvent, and the mortgage given by Brown to Trafton and assigned to Darling was by him foreclosed. The plaintiff seeks a conveyance of the premises mortgaged, to the extent of his interest as disclosed. The requisite demand to convey has been made. Darling has been defaulted, and may be deemed as taking no exceptions to the plaintiff's claims, except so far as may be necessary for the protection of his legal rights. The defendant Swazey admits that the purchase of the notes and mortgage was made with the

joint funds of Darling and himself, but denies that any trust has arisen between him and his co-defendant in consequence of such purchase, and insists that his rights as against Darling, and the plaintiff's claims as against him, rest only in contract, and that on such contracts the remedies existing at common law are ample for the protection and enforcement of all just claims, without the interposition of a court of equity.

The first question to be determined is, What were the relations subsisting between Darling and Swazey, under and by virtue of their joint purchase and of the memorandum of June 27th? The bill alleges, and the answer of Swazey admits, that the purchase was made by Darling with joint funds and on joint account. It is well settled that when one makes a purchase in his own name, but with funds belonging to another, that the purchaser holds the property thus acquired in trust for the person by whom the funds were furnished. So where it is made with joint funds, and the conveyance is made to one only of the parties interested in the purchase money, he holds it in trust for his associate to the extent of the funds by him advanced. The same principle applies where securities are taken in the name of one only who may be interested, the others will be entitled to their share as a resulting trust: 2 Story's Eq. Jur., sec. 1206. In the absence, then, of any other evidence, here would seem to be a trust which a court of equity would enforce.

So where the trust is in writing, the law requires no particular form of words by which it is to be evidenced. The letters of a party to be charged, his memoranda, notes or papers left by him and found after his decease, his answers to a bill in equity, have been a sufficient foundation for judicial action: 2 Story's Eq. Jur., sec. 1201. By the memorandum of June 27th, it appears that Swazey was equally interested with Darling in the notes transferred and the accompanying mortgage assigned to him. If this had been all, it must most unquestionably have been deemed a sufficient declaration of trust, in conformity with the decision of the court in *Fisher v. Fields*, 10 Johns. 496. But the memorandum, after reciting the joint interest of the two defendants, adds these words: "And I hereby agree to account and pay the said Swazey one half of all sums of money received on said notes as collected." Does this discharge the trust obviously arising from the antecedent facts as recited, and if the notes should by levy or foreclosure be converted into real estate, leave it in the hands of Darling relieved from all trust obligation? Without the addition of these words, the law would imply, in a case of

joint purchase of the notes, a promise to account for their proceeds, and this clause, merely asserting an implied promise, can not be considered as destroying the trust so that Darling could hold the funds or their proceeds in whatever form received, free from such trust. It negatives no facts by which the trust is created.

In case of a mortgage, the notes are deemed the principal and the land merely accessory thereto. When one of many notes secured by mortgage is transferred, and after such transfer the mortgagee forecloses his mortgage, he holds the land foreclosed in trust for the unpaid mortgage notes, in whose hands soever they may be, in the ratio such notes bear to the whole debt remaining unpaid: *Pattison v. Hull*, 9 Cow. 747; *Johnson v. Candage*, 31 Me. 31.

The notes being held in trust by Darling, the same trust would attach to the land which went to constitute their payment. The memorandum of June 27th looks only to a money payment. But if Darling were permitted, as against Swazey, to hold these lands in his own right, he would be without remedy. If, by the notes being in whole or in part paid by a foreclosure, there is no trust, and a court of equity would have no jurisdiction—then neither a sale could be enforced nor a conveyance compelled, and the time might never arrive when Swazey would be able to derive any benefit from his investment. The equal interest between these parties is not merely in the notes, but “in the security for the payment of the same.” By the express declaration of Darling in writing, the interest of Swazey is not to be confined to the mere notes, but attaches likewise to the security. By operation of law, the notes become paid in whole or in part by a foreclosure of the mortgage given for their security. The security thus changes its relation and becomes principal, but the interest of Swazey equally exists therein, when the title became perfected by foreclosure, as when the real estate was collateral only to the notes.

As between Swazey and Darling, the conclusion is that a trust arose, and that Swazey might compel a conveyance to the extent of his interest. He was the *cestui que trust*, and had an interest which he might assign or sell, and which, by the laws of descent, would pass to his heirs.

The bill alleges that the plaintiff Buck furnished funds to the amount of one sixth, and that Swazey, as his agent, invested them in the purchase of so much of the notes and mortgage. This is explicitly denied by the answer, which states that the

purchase was made by Darling with his funds and those of the defendant Swazey, and that Buck, subsequently to the purchase, advanced the funds for which the receipt of September 16th was given. If the purchase had been made with money advanced by Buck to Swazey, and by Swazey furnished to Darling, if no equities of the latter intervened, the plaintiff Buck might follow his funds as far as they could be traced, and hold the estate purchased to the extent of such advance: 2 Story's Eq. Jur., sec. 1259. But while a trust will thus be enforced, it must arise at the time of the purchase if at all. No resulting trust can be created by after advances or funds subsequently furnished: *Rogers v. Murray*, 3 Paige, 390; *White v. Carpenter*, 2 Id. 238. The allegations in the bill being denied, there is no evidence of any joint interest on the part of Buck in the funds by which the notes were purchased, and he can not therefore, on that ground, charge the estate as trust property.

By the contract of September 16th, Swazey gave the plaintiff certain rights. The receipt of that date does not disclose in whom the legal title to the notes and mortgage was vested. But having a trust estate in notes and mortgage, and consequently the means to coerce a conveyance, Swazey would be equally compelled to convey when he should acquire a title as if the title had been in him at the time of making such contract. For a valuable consideration, Swazey agreed to account for and pay one sixth of the proceeds of the Brown notes "when received and in manner as received." So far, therefore, as regards him, the case stands as if the notes and mortgage had been originally transferred to him and he had foreclosed the mortgage. If, then, the land was taken in payment, Swazey would be bound to make the same payment. The clause was obviously beneficial to him, as he would by the terms of his agreement be at once discharged upon paying or tendering payment "in manner as received." In no other mode could he perform his stipulations. The case then resolves itself into the common one of a contract to convey specifically, and which the court will enforce, though the party may have a remedy at common law: *Ensign v. Kellogg*, 4 Pick. 1. By this contract Buck became entitled to his part of whatever might be received in payment of the notes therein described, "to be paid when received and in the manner received." If the title to the notes and mortgage had been in Swazey, a trust would have been created in his favor, the execution of which a court of equity would have compelled: 1 Greenl. Cruise on Real Prop. 355. As between them,

the trust none the less arises, though Swazey, instead of having the title in himself, has the right of obtaining it by equitable process against his trustee.

By the memorandum of November 5, 1841, given by James Swazey to George W. Swazey, it is clearly admitted that fifty dollars had been invested in the original purchase of the Brown notes and mortgage by the latter. As the notes have by the foreclosure been paid in whole or in part by the land mortgaged, the same investment, and to the same relative amount, must be deemed as continuing in the land after such foreclosure as existed previously in the notes.

By the terms of this contract the interest was subject to the order of the party interested, and though that would not entitle the assignee to maintain in his own name an action at common law, yet in equity the rule is well settled to be otherwise: 2 Story's Eq. Jur., sec. 1040.

The interest of James Swazey in the original transaction is one which would pass by assignment or transfer, or by will. If these contracts signed by him were to be viewed as assignments *pro tanto* of his interest in the notes and mortgage, the same results would follow. In *Lett v. Morris*, 4 Sim. 607, an order to pay out of a particular fund was decreed to be an equitable assignment to such extent. In all cases of assignment of a debt the assignee will be entitled to the full benefit of such securities as the assignor may have, unless there is an express stipulation otherwise between the parties: *Pattison v. Hull*, 9 Cow. 747.

As in this case the plaintiff is ultimately entitled to a conveyance, Darling must be decreed to hold the land in trust for him, and a conveyance may be directly enforced in his favor: 2 Story's Eq. Jur., sec. 1250. The conveyance, when made, will discharge the defendant Darling from so much of his contract as shall thereby have been performed.

The answer of Swazey refers to certain unsettled matters arising out of his and the plaintiff's joint interest in the brig Mattawamkeag, upon an adjustment of which he claims that a balance would be his due. The answer, except so far as responsive to the bill, is not evidence. Whenever matter in discharge or avoidance is asserted, or new and substantive claims are advanced, they must be established by proof. No proof whatsoever in reference to the claims upon which the defendant Swazey relies as an excuse or justification for withholding the plaintiff's rights has been offered. They can not therefore be regarded.

As Darling has submitted to a default, and is to be regarded as a mere stakeholder, the conveyance as prayed for against him must be decreed, but without cost on his part. As to Swazey, the plaintiff is entitled to a decree against him with costs.

SHEPLEY, C. J., and TENNEY, WELLS, and RICE, JJ., concurred.

RIGHT OF ASSIGNEE TO BRING ACTION IN HIS OWN NAME: See *Hopkins v. Hopkins*, 53 Am. Dec. 663; *Moor v. Veazie*, 52 Id. 655; *Chase v. Plymouth*, 50 Id. 52; *Crain v. Paine*, Id. 807; *Childs v. Clark*, 49 Id. 164; *Phillips v. Runnels*, 43 Id. 109; *Muir v. Schenck*, 38 Id. 633; *Miller v. Bledsoe*, 32 Id. 37.

ANSWER IN EQUITY AS EVIDENCE FOR DEFENDANT: See *Commonwealth ex rel. Claghorn v. Cullen*, 53 Am. Dec. 450, and cases cited in the note page 473; see also *Price v. McDonald*, 54 Id. 637; *Garretson v. Vanloon*, Id. 492; *Grafton Bank v. Doe*, 46 Id. 697; *Sanborn v. Kittredge*, 50 Id. 58.

RESULTING TRUSTS, GENERALLY.—This subject is discussed at length in the note to *Neill v. Keese*, 51 Am. Dec. 746; see also *Moffatt v. Shepard*, 52 Id. 141; *Beck v. Ulrich*, 53 Id. 507.

MORTGAGE FOLLOWS NOTE IT WAS INTENDED TO SECURE: *Roberts v. Halstead*, 49 Am. Dec. 541.

RESULTING TRUST MUST ARISE AT TIME LEGAL TITLE IS TAKEN, if at all; the payment of the purchase money must have been made or an obligation to pay incurred at the time of the purchase, and no subsequent payment, however clearly proved, will answer the requirements of the law: See the note to *Neill v. Keese*, 51 Am. Dec. 755, and cases cited. The principal case was cited to this effect in *Olcott v. Bynum*, 17 Wall. 60.

BANGOR v. GODING.

[35 MAINE, 73.]

REPEAL OF STATUTE GIVING LIEN TO LABORERS PENDING ACTION destroys the right of action where there is no saving clause in the repealing statute; and this, notwithstanding that an attachment had been levied by virtue of the prior statute.

LIEN CREATED BY STATUTE FOR PAYMENT OF DEBT IS BUT PART OF REMEDY afforded by the law for its collection; and a change of that remedy does not affect the obligation of the contract.

INCIDENT RIGHTS NOT PERFECTED, GIVEN BY STATUTE, MAY BE TAKEN AWAY BY STATUTE.

SUIT by the plaintiffs under the provisions of the revised statutes, chapter 125, section 37, giving laborers a lien for materials furnished and labor performed in the erection of buildings, "by virtue of any contract with the owner thereof, or any other person who had contracted with such owner." The facts are stated in the opinion. The property was attached by the plaintiffs, and the defendants brought a writ of entry to recover possession.

Wakefield, city solicitor, for the demandants.

Moody, contra.

By Court, SHEPLEY, C. J. The city made a contract with Thompson & Files to build a school-house. Goding and Wood, the defendants, worked on that house for Thompson & Files; commenced a suit against them; recovered judgment, and caused an execution thereon to be levied upon a part of the house, and a lot of land on which it had been erected.

The suit was commenced and an attachment of the house and lot made on March 16, 1850. The judgment was rendered on February 11, 1851. The levy was made on March 5, 1851.

An amendment of the statute, chapter 125, section 37, was made by an act approved on June 28, 1850, "by striking out the words 'or other person, who had contracted with such owner.'"

This amendment was in force as early as October 1, 1850. It operated as a repeal of so much of the thirty-seventh section as provided for a lien in favor of those who provided materials or furnished labor to erect a building by virtue of a contract not made with the owner, but with a person who had contracted with the owner. There was no clause saving the rights of those who had already performed such labor for one who had contracted with the owner. The amendment did not act retrospectively to destroy the attachment or any other right, but it did operate, from the time when it became a law, upon all existing persons and rights alike. Those who had not already acquired and perfected their rights under the provisions of the statute, before it was amended, were left without any authority to proceed further, and by subsequent proceedings to levy upon the property of another than their debtor, in payment of their debt.

It is insisted, that by the existing law and by the attachment made by virtue of it the defendants had acquired rights which could not be destroyed by a subsequent change of the law.

A lien created by statute, in favor of a creditor, upon the property of his debtor or upon that of another person, for payment of the debt, is but a part of the remedy afforded by law for its collection. A change of that remedy does not affect the obligation of the contract. It does not attempt to do so, but leaves it perfect and unimpaired. If the lien be an incumbrance upon the estate, it is no more so than a common attachment made by a creditor of the estate of his debtor; and that.

is clearly a part of the remedy provided for the collection of his debt.

If, after such an attachment had been made, the provisions of the statute authorizing a levy to be made upon the estates of debtors should be repealed, there would remain no law authorizing the officer to seize the estate and perform the acts necessary to make a perfect levy; and the creditor would lose the benefit of his attachment. So in this case, although the attachment was not destroyed by the amendment, there remained afterward no provision of law authorizing the officer, by virtue of an execution against Thompson & Files, to seize and make a levy upon the estate of the city.

The cases cited in argument, by the counsel for the city, fully establish the rule of law, that whatever incipient rights, not perfected, are given by statute, may be taken away by statute; and also that the legislative power may rightfully act upon the remedy provided for the collection of debts.

Defendant defaulted.

TENNEY, WELLS, and HOWARD, JJ., concurred.

LIEN GIVEN BY STATUTE IS PART OF REMEDY, and is subject to the legislative control; the principal case was cited to this point in *Frost v. Ilstey*, 54 Me. 351; *Allen v. Ham*, 63 Id. 534; *Pratt v. Seavey*, 41 Id. 372. In *Bolton v. Johns*, 46 Am. Dec. 404, it was held that a statute which operates retrospectively so as to give a mechanic a lien for work already done is constitutional, as the same only affects the remedy.

GLIDDEN v. CHASE.

[35 MAINE, 90.]

LEVY OF EXECUTION FOR SUM EXCEEDING AMOUNT OF JUDGMENT, including the debt, costs, and interest, and the charges of levy, by fourteen cents, is void, and as there can be no apportionment of the land taken, it is wholly invalid.

EXCESSIVE LEVY IS INVALID where the excess is more than the value of any coin which by statute is made legal tender, *semble*.

LEVY ON REAL ESTATE WHICH INCLUDES OFFICER'S FEES AND CHARGES NOT AUTHORIZED by law is valid. The creditor has no control over the acts or fees of the officer in such a case, and ought not to suffer by his official misconduct.

WRIT of entry. The demandant purchased the premises under an execution sale; subsequently the execution debtor conveyed the land to the defendant. The demandant's right to recover depends upon the validity of the levy, and two objec-

tions were made to it: 1. As to the notice given to the debtor by the sheriff to appoint appraisers; 2. On account of the excess in the levy. The case was submitted to the court.

Paine and Libbey, for the demandant.

G. W. Crosby, *contra*.

By Court, HOWARD, J. The demandant is entitled to judgment if the levy of his execution on the demanded premises can be supported. It was made, as it appears by the return of the officer, for a sum exceeding the amount of the judgment, including the debt, costs, and interest, and the charges of levy, by fourteen cents: and consequently, more land was taken from the debtor than, at the appraised value, would satisfy the sums for which the levy could have been properly made.

It is not assumed that a creditor can legally take more land from his debtor, by levy, than may be sufficient, at the appraisement, to satisfy his execution, and all fees and charges of levy; but it is contended that the excess was so small in the levy of the demandant, that it may be regarded as a trifle which can not affect the validity of the proceedings. *De minimis non curat lex*, is a sound maxim of the common law when properly applied, but it furnishes no positive rule of duty. It had its origin in necessity, and was not intended to excuse negligence or justify wrong, in any form.

Fractions which can not be expressed in legal money of the country have been regarded as trifles. But a sum large enough to be paid in coin that may be a legal tender, and which constitutes a debt, and may be collected by legal process, can not be regarded by the law as worthless and trivial. If such a sum be a trifle, "it would be difficult to draw the line, and say how large a sum must be not to be a trifle," as stated by Parsons, C. J., in *Boyden v. Moore*, 5 Mass. 371.

The excess, in the present case, was double the value of the smallest silver coin current by law when the levy was made; and more than quadruple the value of the least silver coin made a legal tender before the time of redemption by the debtor had expired: U. S. Laws, March 3, 1851, c. 20, sec. 11. For such excess the levy must be void, and as there can be no apportionment of the land taken, it must be wholly invalid. And in our opinion, the like consequences must follow where the excess is more than the value of a coin which by statute is made legal tender: *Huse v. Merriam*, 2 Me. 375; *Dwinel v. Scoper*, 32 Id. 119 [52 Am. Dec. 643]; *Pickett v. Breckenridge*, 22 Pick. 297

[33 Am. Dec. 745]; *Boyd v. Page*, 30 Me. 460; *Skinner v. McDaniel*, 5 Vt. 539. In *Huntington v. Winchell*, 8 Conn. 45 [20 Am. Dec. 84], the levies, which apparently exceeded the amount to be paid, were sustained. But upon an accurate computation, it appeared that the land fell short of the estimate, and the creditor did not obtain the full value of his judgment and costs by a few cents. In *Spencer v. Champion*, 9 Id. 537, it was held that the excess of fourteen cents did not invalidate the levy, upon the principle settled by the same court in *Huntington v. Winchell*, *supra*.

Levies of executions on real estate, which included officer's fees and charges, not authorized by law, have been sustained, upon the ground that the creditor had no control over the acts or fees of the officer, and ought not to suffer by his official misconduct. Such overtaxation would be for the benefit of the officer solely, and for which the creditor could not be held responsible. Justice and general convenience require that such a levy should be upheld, although the officer would be answerable to the debtor for the excess of fees so taken; and if they were corruptly and willfully demanded and received, he would be liable to be punished on indictment and conviction, or subjected to a forfeiture: R. S., c. 158, sec. 17; *Sturdivant v. Frothingham*, 10 Me. 160; *Holmes v. Hall*, 4 Met. 419; *Burnham v. Aiken*, 6 N. H. 306.

In this view of the case, the objection that the levy was not made in conformity with the statute requirements does not become material.

Demandant nonsuit.

SHEPLEY, C. J., and TENNEY, WELLS, and APPLETON, JJ., concurred.

EXCESSIVE LEVY AND SALE UNDER EXECUTION, EFFECT OF: See *Dwinn v. Soper*, 52 Am. Dec. 643, and note; *Humphry v. Beeson*, 48 Id. 370; *Ingram v. Belk*, 47 Id. 591. The principal case was cited in *Treadwell v. Patterson*, 51 Cal. 638, to the point that a sale of land for a delinquent tax for a sum in excess of the tax and legal costs is void if the excess be as much as the smallest fractional coin authorized by law.

EFFECT ON EXECUTION OF OFFICER EXACTING AND COLLECTING TOO MUCH FEES.—Mr. Freeman, in his work on executions, section 381, says: "While an extent for more than the amount authorized by the execution has been usually held void, the rule is different with an extent based partly on excessive or illegal fees charged by the officer for executing the writ. Because the creditor has no control over the officer, and also because the debtor has an ample remedy against the officer, the misconduct of the latter in charging illegal fees is not treated as fatal to the extent. 'It has been repeatedly held

that a levy is not to be avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law. The officer in such case is liable to the debtor, but the levy is held valid. The creditor is not to suffer by reason of such extortion on the part of the officer." This rule is thoroughly established by the authorities: *Sturdivant v. Frothingham*, 10 Me. 100; *Keen v. Briggs*, 46 Id. 469; *Wilson v. Gammon*, 54 Id. 384; *Holmes v. Hall*, 4 Met. 419; *Avery v. Bowman*, 40 N. H. 457; *Odiorne v. Mason*, 9 Id. 24; *Eastman v. Curtis*, 4 Vt. 616; *Burnham v. Aiken*, 6 N. H. 306; *Camp v. Bates*, 13 Conn. 7. Richardson, C. J., in *Odiorne v. Mason*, said: "Illegal charges have been much too common in extents. And if it should now be decided that this circumstance rendered them void, great uncertainty as to the validity of titles to real estate resting on extents must inevitably be the consequence, and great mischief ensue to creditors and innocent purchasers. The court is therefore of opinion that illegal fees do not in any case render an extent void, but the debtor is to be left to his remedy against the sheriff, who is responsible for any illegal charges he makes in such cases." And as Mellon, C. J., said in *Sturdivant v. Frothingham*: "If a levy is to be pronounced totally void for such a reason, an actual loss to the execution creditor to the amount of thousands may be the consequence on account of a surplus, unauthorized charge, and satisfaction of one dollar. Why should the innocent purchaser be thus compelled to bear the consequences of an act unlawful on the part of the officer? In a case of this kind the court may look forward to the consequences of such a decision as might probably go to the disturbance or destruction of hundreds of titles which have never before been questioned. On the whole, we do not feel authorized to declare the levy void for the reason which has been urged." The only case opposed to this position is *Beach v. Wacker*, 6 Conn. 190. There it was held that, in the absence of statute, if by reason of unlawful charges too much land was taken and set off to the creditor, the proceeding, being an entire and indivisible act, was wholly void; but a statute having been passed, after the commencement of the action, providing that no levy of an execution on real estate previously made should be deemed void because the officer embraced in his return greater fees than were by law allowable, the court held the statute constitutional and the levy valid. The court said: "The law undoubtedly is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable and for necessary services in the performance of his duty; of consequence, they are eminently just; and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced." In the same state a subsequent statute was passed validating levies where the officer had charged too much fees. The counsel in *Camp v. Bates* attempted to draw a distinction between the charges of an officer which were not for his personal services, and therefore not supposed to be included in the term "fees," and such as were strictly and technically fees, being the remuneration the law gave him for his own services; but the court said: "We can not yield our assent to this proposition. The refined distinction urged upon us would force us to give a construction to the statute unnecessary to a due protection of the rights of the debtor, subversive of its spirit, and at variance with its terms, ineffectual to afford a complete remedy for the mischief it was designed to obviate, opposed to the analogies of our law and the decisions of this court, and unsupported by principle or authority. The statute under consideration is highly remedial, and should receive a liberal interpretation in aid of the remedy it was intended to furnish."

The subject of execution and judicial sales, for a sum greater than authorized by law, is considered in the note to *Patterson v. Carneal*, 13 Am. Dec. 212. Courts have always been astute in discovering causes to invalidate tax sales. Where such sales are made from the delinquent or assessment roll, and are not preceded and authorized by some judicial proceeding establishing the amount of taxes and costs, a sale for the payment of any excessive or unlawful charge is void: *Cooley on Taxation*, 344; *Treadwell v. Patterson*, 51 Cal. 637; *Buchnall v. Story*, 36 Id. 67; *Blackwell on Tax Titles*, 192; *Drew v. Davis*, 33 Am. Dec. 213; *Wills v. Austin*, 53 Cal. 152; *Harper v. Rowe*, Id. 233.

MILLER v. MARSTON.

[35 MAINE, 153.]

LIEN UPON PERSONALTY AT COMMON LAW IS FOUNDED ON POSSESSION, actual or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged. It involves the right to an uninterrupted possession while it exists, and is lost or waived when possession is voluntarily surrendered.

STABLE-KEEPER HAS NO LIEN UPON HORSE FOR ITS KEEPING, or for doctoring the horse, where the service was rendered in the usual course of keeping and without any special contract therefor.

PARTICULAR LIEN FOR KEEPING MUST BE RESTRICTED TO THING KEPT; it is a claim *in rem* which the keeper can not extend to other property; consequently a lien for the keeping of a mare can not be extended to a sleigh, harness, and robes in the keeper's possession.

REFLEVIN for a mare, sleigh, harness, and robes belonging to the plaintiff and left by him in the care of the defendant, a livery-stable keeper. The defendant refused to deliver the property, claiming that he had a lien upon the goods for the keeping of the mare. The case was submitted upon the legal question whether the defendant had such a lien as authorized him to retain possession to secure payment for the keeping.

Gilbert, for the plaintiff.

Tallman, *contra*.

By Court, HOWARD, J. The defendant, as keeper of a livery-stable, claims a particular lien, by operation of law, upon the property replevied, for the board of the plaintiff's mare in controversy.

A lien upon personal property, at common law, is founded on possession, actual or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged. It involves the right to an uninterrupted possession while it exists, and is lost, or waived, when possession is voluntarily surrendered.

The owner of a horse put at livery has the right to use and possess it at all times; and hence it is that the keeper has no lien upon it for the keeping. The nature of the contract between the owner and keeper is such that the elements of a lien are wanting.

The doctrines of particular liens as applicable to innkeepers, and those who are bound to receive goods, and to bailees for hire, who by their labor and skill impart additional value to the goods, have never been extended by the common law to keepers of livery-stables or agisters of cattle: *Chapman v. Allen*, Cro. Car. 271; the *Case of an Hostler*, Yelv. 67; *Yorke v. Grenaugh*, 2 Ld. Raym. 868; *Bevan v. Waters*, 3 Car. & P. 520; *Jackson v. Cummins*, 5 Mee. & W. 342; *Grinnell v. Cook*, 3 Hill (N. Y.), 485, 491 [38 Am. Dec. 663]; Story on Agency, sec. 361, 367.

If the defendant had taken the horse to be kept and cured, as in the case of *Lord v. Jones*, 24 Me. 439 [41 Am. Dec. 391], or to be kept and trained for a race-course, as in *Bevan v. Waters*, 3 Car. & P. 520, or for some other special purpose besides the keeping, he might have been entitled to a lien. But in this case there was no proof that the defendant was to keep the plaintiff's mare for any special purpose, or in a manner different from his ordinary mode of keeping horses in his livery-stable. The charge for "doctoring her" may have been reasonable; but it was for incidental services rendered in the usual course of keeping, and without any special contract therefor, and can not create a lien by contract, by usage, or by the particular circumstances of the case.

But if the defendant had a lien upon the mare for her keeping, he can not, on that account, detain the sleigh and harness and robes replevied. A particular lien for the keeping must be restricted to the thing kept. It is a claim *in rem* which the keeper can not extend to other property.

A default must be entered according to the agreement.

SHEPLEY, C. J., and TENNEY, RICE, and APPLETON, JJ., concurred.

AGISTERS AND LIVERY-STABLE KEEPERS HAVE NO LIEN FOR SERVICES: *Grinnell v. Cook*, 38 Am. Dec. 663; and see the cases cited in the note to *McIntyre v. Carver*, 37 Id. 522, supporting this position. The principal case was cited on the point that agisters of cattle have no lien on them for their keeping, in *Goodrich v. Willard*, 7 Gray, 184.

LIEN MUST BE ACCOMPANIED BY POSSESSION, TO BE EFFECTUAL: *Oakes v. Moore*, 41 Am. Dec. 379; *Jenkins v. Eichelberger*, 28 Id. 691; *McIntyre v. Carver*, 37 Id. 519, and the cases cited in the note page 522. The language

of the principal case on the point that a lien was founded on possession, and was lost or waived when the possession was voluntarily abandoned, was quoted with approval in *In re Mitchell*, 8 Nat. Bank. Reg. 48.

COLE v. SPROWL.

[35 MAINE, 161.]

SUPREME COURT CAN PASS UPON THOSE INSTRUCTIONS, ONLY WHICH ARE STATED in the report.

PLAINTIFF'S CLAIMING MORE THAN HE PROVED, or more than he legally could demand, or his presenting his claim on different grounds in different counts in his declaration, forms no objection to his right to recover in an action to recover damages of the defendant for erecting a shop upon a road so near the plaintiff's store as to deprive him of the use of the road and store.

PRIVATE PERSON CAN RECOVER FOR OBSTRUCTION TO PUBLIC WAY, although it might also be a public nuisance, where the obstruction would constitute an invasion of his rights, causing special damage to him, not common to others, for which an action would lie.

NO PARTICULAR CEREMONY IS REQUIRED TO MAKE DEDICATION, nor is any time prescribed by law as essential to securing the enjoyment; dedications may be presumed from facts and circumstances proved; and so may the assent of the owner of the land and the acceptance by the public.

DECLARATIONS AS WELL AS ACTS OF OWNER MAY BE EVIDENCE OF DEDICATION of land by him for a road.

REFUSAL OF INSTRUCTION ON ABSTRACT PROPOSITION IS NOT ERROR.

ROAD CAN NOT BE CHANGED EXCEPT BY COMPETENT AUTHORITY; and where a grantor bounds a tract conveyed to the plaintiff on a road running through the remaining part of his land, and the road as established before that time was contiguous, neither the grantor nor a subsequent devisee of the remaining part can alter the location.

PURPOSES FOR WHICH ROAD IS TO BE USED IS QUESTION OF FACT for the jury, on the conveyance of a tract of land bounded on a road leading through the remaining part of the grantor's land, and it is not error to refuse an instruction that the word "road" denotes only a right of way over the grantor's other lands for the same purposes for which it was used by the grantor at the time of the conveyance.

DAMAGES FOR OBSTRUCTING HIGHWAY and the lights and doors of plaintiff's house, by erecting a building in the highway, are recoverable to the date of the writ only, and not to the time of the trial.

CASE for obstructing the doors and lights of plaintiff's store, and also a road over which he had a right of way. William Sprowl had formerly owned the entire tract concerning which the difficulty arose. In 1841 he conveyed to the plaintiff, Cole, a lot, commencing at a certain corner on the west side of South street and extending forty-five feet "to a road leading toward the wharf," thence running south seventy degrees west, etc. The road mentioned was in an open space along the south line

of the tract. This open space subsequently came to the defendant by a devise from William Sprowl. The plaintiff had erected a store on the south boundary of the tract facing the open space, and the injury complained of was committed by the defendant in erecting a building on this open space within three and a half feet of the plaintiff's store, thus obstructing his doors and lights, and his right of way over the road. The plaintiff claimed that as the deed extended the lot to the road, he acquired a right of way over the road, which the defendant obstructed, and also that there had been a dedication of the road, and that the erection of the building upon it was wrongful. There was testimony tending to prove and disprove that the road had been traveled and used; and testimony tending to prove that all of the empty space had been used for a landing connected with a wharf, and that lumber had been piled upon it during all seasons of the year, for which the owner was paid landage and wharfage, and also proving that the place where defendant's building was erected was at the time of the conveyance to the plaintiff covered with lumber piled there by William Sprowl; there was also conflicting testimony as to a dedication of the land. The defendant contended that the deed did not give the plaintiff a right by implication to use the road, and that the open space was a landing for a wharf for the piling of articles taken from vessels, and for which he received pay, and that the road mentioned in the plaintiff's deed was a private way merely for the defendant's accommodation and profit, and not a public road. The defendant further contended that if the plaintiff took any right in the wharf road, it was in the road as used at the time of the conveyance; but if this was not so, still that the direction in which it should run could not be prescribed by the plaintiff, and that as there has always been a road open, the plaintiff can not complain that the defendant's building obstructed the right of way. The plaintiff requested several instructions, and those which it is necessary to notice are substantially as follows: 2. That the words "to a road" in the phrase "to a road leading toward the wharf" were words of exclusion, so that nothing passed but what was included within the boundaries expressed in the deed; 3. That the plaintiff's right to a road arose, if at all, from the estoppel of the defendant to deny the existence of a road arising from the words "to a road" in the deed; but that estoppels were strictly construed, and never enlarged by implication, and that as the deed only called for a road at the end of the first line, if

the jury find that there was at that place the same road leading toward the wharf, unobstructed by the defendant, the plaintiff could not recover; 4. That the word "road" meant merely a right of way over the grantor's lands for the same purposes for which it was used when the conveyance was made; and that the words "to a road leading toward the wharf" indicated that it was a wharf road; 6. That if the road was not contiguous to the southern boundary of plaintiff's lot, but diverged therefrom, the deed would not give the plaintiff any right of passage on the south side of the plaintiff's building; 8. That plaintiff could not have acquired any right by dedication unless proved by evidence of acts on the part of the owners showing that defendant, or William Sprowl, intentionally dedicated the right of way; that evidence of dedication may be rebutted by showing that the owner merely permitted persons to pass over the land and not to dedicate it; and that the acts of defendant in using and occupying the land at pleasure, and receiving compensation from others for piling wood and other articles on it, would rebut the evidence of dedication. These instructions were refused. The defendant also requested the court to instruct the jury that it was necessary in order to constitute a dedication to show not only an intention of the owner by his acts and declarations to dedicate his lands, but an acceptance by the public as well; and that the acceptance and dedication must have been before the conveyance to the plaintiff. This instruction was given with the difference that the word "and" between the words "acts" and "declarations" was changed to "or." The court instructed the jury that the plaintiff's tract under the deed was bounded on a road at the corner of his lot upon South street adjoining the open tract; that the road from that point to the wharf was to be determined by the testimony, and that they would ascertain where the road had been used and established before the conveyance; that if the place where the defendant's building was erected was at the time of the conveyance to the plaintiff covered by wood piled there, this would not necessarily determine that the road had not been established there before that time, and incumbered by the wood; that the owners might dedicate the land by their acts or declarations to the public for a road, and that if it was the intention of the owners so to do, and they had done it, and it had been used as a road, use of the road for any particular length of time was not necessary. The plaintiff claimed that he should recover for damages sustained to the time of the trial, but the

court instructed that damages to the date of the writ only could be recovered; the plaintiff excepted to this instruction. Verdict for plaintiff.

Ruggles, for the plaintiff.

Lowell, *contra*.

By Court, HOWARD, J. The existence of "a road leading toward the wharf" was not directly denied; but the particular location and boundaries of such road, whether it was contiguous to the land of the plaintiff, or so distant from it that the defendant's land intervened; and whether the defendant and the former owner of the land had by their acts and declarations dedicated the land to the public as a way or road, were all matters contested at the trial, and submitted to the jury upon instructions which, in part at least, were not objected to by the defendant. We can pass upon those instructions only which are stated in the report, and if in giving or refusing any of these there is error, then there is to be a new trial.

It is no valid objection to the plaintiff's right to recover that he claimed more than he proved, or more than he could legally demand, or that he presented his claim on different grounds in different counts in his declaration. Substantially, he claimed damages of the defendant for his constructing a shop upon the road, before mentioned, so near to the plaintiff's brick store, standing upon his own land, as to deprive him of the use of the road and store. There can be no doubt of his right to recover, if the facts were proved as stated in his declaration; for the shop would constitute an invasion of his rights, causing special damage to him, not common to others, for which an action would lie; although, as an obstruction to a public way, it might also be a public nuisance: Co. Lit. 56 a; *Williams' Case*, 5 Co. 73; 3 Bla. Com. 219; *Sutherland v. Jackson*, 32 Me. 80.

The instructions given embracing the construction of the conveyances under which the plaintiff claims, respecting the boundary of his land at the corner of South street by the road leading to the wharf, and the directions to the jury to ascertain and determine from the testimony where the road referred to had been used and established, before the conveyances, appear to have been required, and they were manifestly correct. The fact that wood was piled upon the place where the defendant's shop has been erected, at the time when the conveyance from William Sprowl was made, did not necessarily determine that the road had not previously been established there. The wood

might have then incumbered the road temporarily, without serving to mark its course or bounds. The instructions on this point were unexceptionable.

Dedications of land by the owner for highways and public purposes, generally or specially, without deed or writing, are familiar to the common law of England. The doctrine is founded upon general principles that adapt it to the common law as adopted in this country. It involves the actual appropriation and use of the land by the public, with the voluntary assent of the owner, and a concession of such of his rights as are incident and necessary to the use. It assumes the fact of dedication, and the acceptance and use by the public, for the purposes for which it was made. When a dedication has been established, its continuance will be presumed until the contrary is shown. By thus appropriating his soil, the owner will be estopped to reclaim it, or revoke the dedication, to the injury of those who have acquired rights in reference to it, in good faith, depending upon its enjoyment: *Rex v. Lloyd*, 1 Camp. 260; *Lade v. Shepherd*, 2 Stra. 1004; *Stafford v. Coyney*, 7 Barn. & Cress. 257.

No particular ceremony is required to make a dedication, nor is any time prescribed by law as essential to securing the enjoyment. Dedications of land may be presumed from facts and circumstances proved; and so may the assent of the owner of the land, and the acceptance by the public: *Jarvis v. Dean*, 3 Bing. 447; *Rex v. Barr*, 4 Camp. 16. In *Cincinnati v. White*, 6 Pet. 431, the doctrine of dedication was examined by Mr. Justice Thompson, and treated as not a novel doctrine in the common law in this country: *Hobbs v. Lowell*, 19 Pick. 405 [31 Am. Dec. 145]; *Wright v. Tukey*, 3 Cush. 290; *Pearsall v. Post*, 20 Wend. 111; *Post v. Pearsall*, 22 Id. 425; *Dwinel v. Barnard*, 28 Me. 564 [48 Am. Dec. 507].

The instruction "that the owners of the land might dedicate it by their acts or declarations to the public use for a way or road" is not objectionable. It is not essential that the act of dedication should be proved, but the fact must be established by competent evidence. The declarations as well as the acts of the owner may be evidence of the fact, and the best evidence of his intention to make the appropriation of his land to public use.

The first request is not stated; the second asks for instructions on an abstract proposition not apparently applicable to the case. For whether the "words 'to,' 'from,' or 'by,' in a deed,"

are terms of exclusion or not, does not seem to have been material to the issues presented. Whether the shop was constructed on the "road leading toward the wharf," so as to cause the particular damages claimed, or upon the defendant's land not covered by the road, were questions of fact, which might be resolved in the same manner, upon the evidence whether the road was wholly or partially excluded from the premises conveyed by the deed of William Sprowl, and whether the premises were bounded by the road to a greater or less extent. The jury had received sufficient instructions to enable them to ascertain and determine the direction and location of the road, and the bounds of the premises conveyed, whether on or near to it, and the denial of this request was not erroneous.

The third request assumes that the plaintiff's right to the road referred to accrued to him by way of estoppel only, and that if the road was unobstructed at a particular point at the time of the alleged obstruction, then the action could not be maintained. But the court could not have instructed the jury, as a matter of law, that the plaintiff's right thus accrued, or that the road did not lie contiguous to the whole length of his lot on the southern side, at the date of the conveyance of William Sprowl, under whom the parties now claim. If the road as established before that time was then contiguous, it could not have been changed afterwards but by competent authority. Neither the grantor nor the defendant was competent to alter the location, or to limit the estoppel by change or substitution, after the conveyance.

The fourth request was properly refused. The presiding judge could not have stated that the word "road," as used in the deed of Sprowl, denoted only a right of way over his other lands, "for the same purposes for which it was used by the grantor at the time of the conveyance," without assuming the province of the jury. Nor could he have instructed them that the language of the deed, by legal construction, sufficiently indicated that "a road leading towards the wharf" was a "wharf road," if such a road has any peculiar properties or uses, as the request seems to indicate. The language would be alike applicable to a private way, a town way, or a public highway. The last paragraphs of this request embrace propositions already sufficiently noticed.

The fifth request is not stated in the report; and the sixth embraces points upon which sufficient instructions were given. It does not appear that the doctrines of prescription, or rights

acquired by adverse possession or use, were applicable or material as the case was presented to the jury.

The seventh request was granted, and the jury were instructed accordingly, "that a right to pass and repass over the defendant's open land around the south side and west end of the plaintiff's brick building, as alleged in his writ, could not have been acquired by dedication."

The response to the eighth request in the instructions given on the subject of dedication was sufficient, and is satisfactory. The ninth request is omitted in the report, and the tenth was answered by the instructions previously given.

The plaintiff could recover damages to the date of his writ only, in accordance with his claim and the instructions given, and his exceptions must be overruled.

Judgment on the verdict.

TENNEY, RICE, and APPLETON, JJ., concurred.

PROPRIETY OF INSTRUCTIONS GIVEN, IF NOT PRESENTED BY MOTION, is not in the case: *Britt v. Aylett*, 52 Am. Dec. 282.

REFUSAL TO GIVE ABSTRACT INSTRUCTIONS IS NOT ERROR: *Stevenson's Heirs v. McReary*, 51 Am. Dec. 102; *Cresinger v. Welch*, 45 Id. 565, and note.

PUBLIC NUISANCE, RIGHT OF PRIVATE PARTY TO MAINTAIN ACTION FOR: See *Stetson v. Faxon*, 31 Am. Dec. 123, and note discussing this subject at length; *Low v. Knowlton*, 45 Id. 100; *Mount Vernon v. Dusouchet*, 54 Id. 467; *Frink v. Lawrence*, 50 Id. 274.

ACTION LIES FOR SPECIAL DAMAGE FROM OBSTRUCTION OF PUBLIC HIGHWAY: *Thayer v. Boston*, 31 Am. Dec. 157; but see the note to *Mayhew v. Norton*, 28 Id. 306.

DEDICATION, WHAT CONSTITUTES.—This subject is discussed at length in the note to *State v. Trask*, 27 Am. Dec. 554; see also *Dwinel v. Barnard*, 48 Id. 507; *Godfrey v. City of Alton*, 52 Id. 476; *Stacey v. Miller*, 55 Id. 112. The principal case was cited in *Hayden v. Inhabitants of Attleborough*, 7 Gray, 344, to the point that a way by dedication is a way over land which the owner has dedicated to the use of the public for a way.

RIGHTS AND REMEDIES OF PERSON OVER WHOSE LAND HIGHWAY HAS BEEN ESTABLISHED.—This subject is discussed at length in the note to *Mayhew v. Norton*, 28 Am. Dec. 300.

DAMAGES FOR INJURIES TO HIGHWAY NOT CONFINED TO THOSE ACCRUING AT DATE OF WRIT, WHEN: See *Troy v. Cheshire R. R. Co.*, 55 Am. Dec. 177. See also *Thayer v. Brooks*, 49 Id. 474. The principal case was cited on the point as to the measure of damages, in *Warner v. Bacon*, 8 Gray, 402.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND

McELDERRY v. SHIPLEY.

[2 MARYLAND, 25.]

WHERE NEITHER FRAUD, MISTAKE, NOR SURPRISE IS PROVED, a court of equity will not interfere to reform an agreement or a deed when it is such as the parties designed it to be.

CONVENTIONAL TRUST CAN NOT BE SET UP ON SPECIAL PAROL AGREEMENT inconsistent with the terms of the deed.

APPEAL from a decree of the court of chancery. James Shipley, through the agency of Thomas Lister, purchased a bill of lumber from Hugh McElderry. In order to secure the payment of the same, Shipley agreed to mortgage to McElderry, through Lister, a piece of real estate, the mortgage to be void on payment of one thousand two hundred dollars by Shipley to Lister, with interest from the date of the deed, on or before a certain date. Shipley was not indebted to Lister, but the mortgage was made to secure the plaintiff's debt. The property was levied on and sold at public sale to satisfy a judgment of C. S. Worthington; whereupon, Lister claimed the mortgage as his own, although he had made an assignment previously to McElderry. The latter entered suit for possession, and Shipley, in his answer, admitted the allegations, but Worthington alleged that the mortgage was made with the intention to defraud the plaintiff in the judgment suit, and that it was also made when the mortgagor was insolvent. The bill was dismissed with costs, and an appeal was taken.

Reverdy Johnson, sen., and Reverdy Johnson, jun., for the appellant.

Tyson and Nelson, for the appellee.

By Court, TUCK, J. The object of the present bill is to obtain a decree for the sale of the property therein mentioned, for the purpose of paying a debt alleged to be due to the appellant by the defendant Shipley. It is said that this can be effected in one of three modes: either by considering the property as charged with a trust for the benefit of the complainant to the extent of his claim; or by reforming the mortgage from Shipley to Lister, and his assignment thereof to the appellant, so as to give to them an effect contrary to their apparent intent; or by foreclosing these instruments for the use of the complainant as assignee.

Whatever may be the doctrine elsewhere, as shown by the cases referred to in the argument, we consider the law to be well settled in Maryland that parol evidence is inadmissible, in a case like the present, to contradict, add to, or vary the terms of a written instrument; and although a court of chancery will, upon proof of fraud, mistake, or surprise, raise an equity by which the agreement will be rectified according to the intent of the parties, it will not interfere where the instrument is such as the parties themselves designed it to be. For if they voluntarily choose to express themselves in the language of the deed, they must be bound by it: *Wesley v. Thomas*, 6 Har. & J. 24; *Watkins v. Stockett*, Id. 435; *Bend v. Susquehanna B. Co.*, Id. 128 [14 Am. Dec. 261]; *Harwood v. Jones*, 10 Gill & J. 404.

The mortgage from Shipley to Lister professes to secure a debt from the former to the latter of one thousand two hundred dollars, and some time afterwards Lister assigned this mortgage to the complainant, to secure a debt of nine hundred and thirty-six dollars and thirty-four cents, for which, as the assignment states, he had passed his note to the complainant. The amount here mentioned is the precise sum alleged to be due by Shipley to McElderry. These exhibits appear in the record. The bill as amended states: "And your orator further avers and charges, that notwithstanding the said assignment of the said leasehold property was made by the said Shipley to said Lister, with the express agreement and understanding between said Lister and Shipley and your orator, at and before the execution of the said agreement, that the same was made and given to secure your orator's claims against said Shipley, as hereinbefore recited, yet the said Lister now fraudulently denies that the same was given upon said agreement and understanding; and with a view to defraud your orator, is attempting to deprive him of the benefit which it was the object of the said assignment to

secure to your orator, he, the said Lister, alleging and claiming that said assignment was made and given for his sole use and benefit. Your orator also alleges and charges, that to give to said Lister or to any other person than your orator the benefit of said assignment would be a gross fraud upon your orator, and upon the agreement under which said assignment was executed by said Shipley."

The appellant offers to show, by parol proof, not that these instruments are not in terms what the parties to them intended that they should be at the time they were executed, but that an agreement was entered into by them at and before that time that Lister should hold the property as a security for the complainant's claims, and that he fraudulently denies the true character and purpose of the mortgage and assignment; and on this allegation of fraud it is insisted that equity should grant relief.

There is no essential difference between this and the case of *Watkins v. Stockett*, *supra*, where the complainant alleged that a deed absolute in terms was designed to operate as a mortgage, and that the grantee, in fraud of a parol agreement made contemporaneously with the deed, refused to recognize it as a mortgage, but claimed the property as his own, against the right of the grantor to redeem. The court of appeals said (it appearing that the deed had been drawn and executed as the parties intended) that the complainant was not entitled to change the character of the deed by parol proof. This is not a resulting or implied trust, such as arises where a party buys land with another's money and takes the deed to himself. There, upon proof that the purchase money was furnished by the person claiming the land, the law raises the trust in his behalf as fully as if it had been declared at the time; here there is no room for implication. The bill shows that the deed and assignment were drawn and executed according to the intention of the parties. The complainant seeks, not to raise an equity by operation of law, but to set up a conventional trust on the foundation of a special parol agreement, contrary to the provisions of the statute of frauds, which requires that trusts in relation to lands, etc., shall be proved and manifested by some writing signed by the party who is by law enabled to declare such trust: *Dorsey v. Clarke*, 4 Har. & J. 551; *Jones v. Slubey*, 5 Id. 372. If it were alleged and proved that Lister had undertaken to procure security for McElderry, by a lien on this property, and that in fraud of this agreement, or by mistake, he had taken the deed

to himself, the case might be within the principle of the Maryland decisions.

If the complainant be regarded as mere assignee of the mortgage, and as claiming as such, he can not succeed on the present record, because the pleadings do not present his claim in that aspect.

We do not consider the case as within the sixth section of the act of 1832, c. 302. If the record were remanded, and the bill amended so as to present a case upon either of the hypotheses suggested in argument, it would, as amended, be so repugnant and inconsistent in its several parts as perhaps to defeat the complainant's recovery altogether: *Mitf. Pl. 385; Cresy v. Bevan, 13 Sim. 354.* To enable the complainant to proceed *de novo*, as he may be advised, we shall reverse the decree of the chancellor dismissing the bill, and sign a decree dismissing it without prejudice. The costs to be paid by the appellant: *Stewart v. Stone, 3 Gill & J. 510; Griffith v. Frederick Co. Bank, 6 Id. 446; Emery v. Owings, 7 Gill, 500 [48 Am. Dec. 580].*

Decree reversed, and bill dismissed without prejudice.

WHEN EQUITY WILL RELIEVE AGAINST FRAUD, MISTAKE, OR SURPRISE: See *Norton v. Marden, 32 Am. Dec. 132; McNaughten v. Partridge, 38 Id. 731; Stone v. Hale, 52 Id. 185; Leavitt v. Palmer, 51 Id. 333*, and notes referring to other cases in this series.

THE PRINCIPAL CASE has been followed extensively in the courts of Maryland, and has been recognized in *Showman and Wife v. Miller, 6 Md. 485; Criss v. Withers' Ex'r, 26 Id. 570; Kidd v. Carson, 33 Id. 42; Dixon v. Clayville, Adm'r, 44 Id. 578.*

KEENER v. HARROD.

[2 MARYLAND, 63.]

WHERE CONTRACT IS ENTERED INTO BY ONE ASSUMING TO ACT AS AGENT OF ANOTHER without having been authorized to make the contract, such pretended agent is personally responsible in the precise terms of the contract.

PRINCIPAL IS NOT BOUND BY AGENT'S ACT unless the same was done in performance of his delegated power.

REAL ESTATE AGENT IS NOT ENTITLED TO COMPENSATION FOR MERELY INTRODUCING VENDEE TO VENDOR, unless his character as such agent was disclosed at the time of the contract.

APPEAL from Baltimore county court. J. J. Harrod and R. H. Brooke instituted suit against Christian Keener to recover a sum of money claimed as compensation due them for their agency in effecting a sale of real estate. A verdict was rendered

for the plaintiffs, and Keener appealed. The other facts are stated in the opinion.

David Stuart, for the plaintiffs.

F. K. Howard and Campbell, for the defendant.

By Court, TUCK, J. This action was instituted by the appellees to recover compensation for services rendered in procuring a purchaser of a certain lot in the city of Baltimore, which the appellant was authorized to sell on commission, as agent for the owners in Philadelphia. It appears that after the property had been a long time in market, the appellees offered to furnish a purchaser to the appellant if he would pay them a bonus of five hundred dollars; and that after several interviews on the subject, the appellant agreed with the agent of the appellees "that he would pay them three hundred and fifty dollars when the names of the persons intending to purchase should be disclosed to him," which was done, and the property afterward sold to them. Several prayers were submitted by the defendant below, all of which were rejected, except the first, which was granted with a modification.

The view which we have taken of the case disposes of the second and third prayers in the bill of exceptions, which are predicated on the supposition that the appellant entered into this agreement as agent for the owners, and that they alone are responsible to the plaintiffs.

To bind the principal, the act must be done in the exercise and within the limits of the power delegated; and whenever a party undertakes to do an act as the agent of another, if he does not possess any authority therefor from the principal, or exceeds his powers, he will be personally responsible to the person with whom he is dealing: Story on Agency, secs. 261, 264. Keener was employed to sell this property, but it nowhere appears that he had any authority to employ, in the name of the owners, any person to assist him in making the sale, or to procure a purchaser. If a man charged to render a particular service engages another to aid him, it by no means follows that he can do so at the expense of his employers without their consent. His own letter, set out in the record, shows that he had no authority so to charge the owners, and that he expected to compensate the plaintiffs by dividing his own commission with them. If he entered into the agreement in confidence that his principals would sanction it, he might have made his liability

depend on their acquiescence. This, however, was not done, and he must meet the consequences.

Regarding this as a personal liability of the appellant, we proceed to inquire whether the facts presented by the record entitled the plaintiffs to recover.

We do not agree with the counsel for the appellees, that they would have earned their reward, by merely disclosing the names of the persons who ultimately purchased the property, as a secret of their business as property agents, if a sale had not been effected. We understand the rule to be this (in the absence of proof of usage), that the mere fact of the agent having introduced the purchaser to the seller, or disclosed names by which they came together to treat, will not entitle him to compensation; but if it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made, the parties can not afterwards, by agreement between themselves, withdraw the matter from the agent's hands so as to deprive him of his commission: *Russell on Factors and Brokers*, 48 Law Lib. 160; *Wilkinson v. Martin*, 34 Eng. Com. L. 267. The legal import of an agreement to procure a purchaser binds the party to name a person who ultimately buys the property: *Murray v. Currie*, 32 Id. 641. It appears that immediately after the names of Barnes and Abbott were disclosed, a negotiation was opened between them and Keener, and a contract concluded for the sale of the property, reserving for the approval of the owners the sufficiency of the securities they were to offer. These being rejected, others were proposed, and finally an arrangement and sale were concluded between the owners and purchasers, on the terms substantially of the contract that they had entered into with Keener. It is insisted on the part of the appellant, that the agreement was to furnish him with a purchaser, and that as the sale was finally made by the owners themselves, he is discharged, and justly so, because not having made the sale himself, he can not demand compensation from his principals. This question of liability, as between Keener and the owners, may be brought within the principle of the cases to which we have referred, if he has done nothing to prevent it. He was the person who brought the owners and the purchasers together, upon information derived from the plaintiffs. It can make no difference to the owners how he found the purchaser, or that the final arrangement was completed by them. They would be equally liable to him for commission, unless he has

forfeited his claim thereto by some act authorizing his principals to withdraw the negotiation from his hands, and take charge of it themselves. We see nothing, however, in the record to warrant such an inference. He made the contract substantially on which the sale was made. The only cause of delay, in the first instance, being the rejection by the owners of the proffered securities, a matter with which Keener had no concern, having referred it to his principals.

The court were right in refusing the fourth prayer. It denied the plaintiff's right to recover "even if they found the purchasers, unless the plaintiffs made the sale to them." The undertaking of the plaintiffs was, not to negotiate as to the terms of sale and conclude the business, but merely to name a person who should buy the property. The appellant was not entitled to the fifth instruction asked by him. Barnes, one of the purchasers, proved that he expressly refused to rescind the first contract, although Keener had again and again invited other proposals from him; and that they finally entered into a new one, which the purchasers thought more advantageous to themselves, but which the owners afterwards disavow as having been made by Keener without authority. The appellant could not claim that the contract was terminated while the owners and the vendees were negotiating as to the securities; that being the only point on which they differed, and one which Keener himself had reserved for the decision of his principals; and more especially as the vendees were offering all the while to increase the securities to the satisfaction of the other parties. The facts stated as the groundwork of the prayer amounted to nothing more than an offer on the part of Keener to break off the treaty if the securities first offered should be declined by the owners. According to the prayer, the plaintiffs' right to recover was made to depend on the contract of sale being completed upon the first proposal, although the vendees were willing and offered to continue the negotiation: thus allowing the defendant to defeat the plaintiffs' claim by refusing to negotiate with the very persons whom they had named as purchasers. We see no justice in this view of the case. Where a party names a purchaser, his right to compensation depends on a successful treaty, and the vendor must deal with the party named in good faith, and afford him a reasonable opportunity to complete the purchase. If the first offer be rejected and another proposed, it should at least be considered. The party naming

the purchaser does not stipulate that his first proposal shall be such a one as the vendor will accept.

The court granted the first prayer of the defendant; but annexed a modification, to which his counsel objects, on the ground that it is inconsistent with the prayer, and because the court had no power, of its own accord, to grant the additional instruction. He can not complain that his own prayer was granted. The question is whether he was injured by the instruction as given, that is to say, by the prayer and the modification, taken together. The court told the jury that if they found from the evidence that the sale was finally made between the owners and vendees in person, the plaintiffs could not claim compensation as for services rendered in furnishing the purchasers. But to this view of the case they added another hypothesis, warranted by the evidence, and which, if believed by the jury, entitled the plaintiffs to recover, and instructed the jury accordingly. This addition to the prayer presented the law of the case substantially according to the views entertained by this court. If there was any error in the entire instruction as given, it consisted in conceding to the appellant more than the facts of the case justified. But of this he can not complain. The court, by granting his prayer, which was part of the instruction, subjected the plaintiffs to the risk of a verdict against them, on the ground that the vendors and vendees themselves had finally arranged the business, when the proof showed that they were brought together, and the sale ultimately made, by means of the agreement between the parties to this suit, by which the plaintiffs had become entitled to their compensation. And the last proviso of the modification places the plaintiffs right to recover, among other facts, on the defendant's not having disclosed the names of his principals at the time of the agreement, whereas, for the reasons before stated, he was responsible to the plaintiffs whether he gave the names of the owners or not.

In *Hall v. Hall*, 6 Gill & J. 399, 404; *Whiteford v. Burckmyer*, 1 Gill, 144 [39 Am. Dec. 640]; *Harrison v. Mayor etc. of Baltimore*, Id. 280, prayers were granted with modifications. The court of appeals reversed the ruling of the court below, in the first and last cases referred to, not because the court had no right of its own motion to add a qualification to the prayer, but for error in that part of the instruction. It is true that a party can not control or modify the hypothesis of the prayer offered by his adversary: *Whiteford v. Burckmyer*, *supra*; but it does not follow that the

court may not do so. However, as a general rule, it may be proper to grant or refuse prayers in the terms in which they are presented; the court may reject them all, and instruct the jury in their own words, or grant the prayers with such explanations or qualifications as may be necessary to a proper understanding of the law of the case: *Hall v. Hall, supra*; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 481 [43 Am. Dec. 341].

According to our view of the instruction as given, it is immaterial whether the prayer and the modification were inconsistent, as urged by the appellant's counsel, or not. For any such error in the ruling of the court the plaintiffs might have complained; but the defendant can not. In the cases referred to on this point, *Hall v. Hall*, *Whiteford v. Burckmyer*, *Harrison v. Baltimore, supra*, it was held by this court that the appellants were entitled to the instructions which they asked, and that the court below erred in annexing qualification which destroyed the effect of the prayers as made. But in this case, the appellant was not entitled to the gratification of his own prayer. The modification, except as to the last proviso, was in accordance with the law of the case; and the entire instruction having placed the defense on more favorable grounds than the appellant could have required, he can not claim a reversal of the judgment: *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 472 [22 Am. Dec. 337]; *Union Bank v. Planters' Bank*, 9 Id. 461.

Judgment affirmed.

LIABILITY OF AGENT.—Agent is personally liable unless he shows authority to bind principal: *Gillaspie v. Wesson*, 31 Am. Dec. 715; *Pitman v. Kintner*, 33 Id. 469; *Wood v. Goodridge*, 52 Id. 771.

PRINCIPAL IS ONLY LIABLE FOR ACTS OF AGENT when the same have been done within the scope of his authority: *Wood v. Goodridge*, 52 Am. Dec. 771; *Brown v. Johnson*, 51 Id. 118; *Goodloe v. Godley*, Id. 159.

THE PRINCIPAL CASE WAS FOLLOWED in *Beale v. Cresswell*, 3 Md. 201; *Coates v. Sangston*, 5 Id. 133; *Higgins v. Carlton*, 28 Id. 139; *Kimberley v. Henderson*, 29 Id. 515.

EYLER v. CRABBS.

[2 MARYLAND, 137.]

JUDGMENT DIRECTING SALE OF REAL ESTATE ON VENDOR'S LIEN, there being no averment of insolvency or a want of other property, is erroneous.

RECORD OF FORMER PROCEEDING IN EQUITY IS NOT ADMISSIBLE in evidence unless the same is certified under the seal of the clerk of the court, or proved under a commission.

APPEAL from Frederick county court. F. Crabbs and wife sold and conveyed the lands in controversy to John Eyler for six thousand dollars. Part of this amount was paid in cash, and Eyler gave his notes for the balance. Suit was brought on these notes by Crabbs, and a judgment recovered. While the suit was in progress, Crabbs filed a bill against Eyler to enforce his equitable lien for the balance due, in which he alleged that Eyler had avoided service of the writ on the notes held by Crabbs. An interlocutory decree was passed, testimony taken in support of the bill, and a decree made ordering a sale of the property. Soon after the suit was brought, Eyler conveyed the lands to Jonas Matthews. Crabbs then entered suit against Eyler and Matthews to set aside the deed from Eyler to Matthews, arresting his lien, and alleging that the latter had knowledge of the same. Eyler and Matthews set up a general denial. A judgment was awarded in favor of Crabbs, and defendants appealed.

J. Nelson, for the appellants.

Ross and Palmer, for the appellee.

By Court, LE GRAND, C. J. The view which we have taken of this case, as presented by the record, dispenses with the necessity of considering some of the points made in the argument of counsel.

The bill was filed for the double purpose of annulling the deed executed by Eyler to Matthews, and of enforcing, as against the defendants, an alleged lien for the unpaid purchase money due upon a sale and conveyance of the property mentioned in the deed from Eyler to Matthews.

The decree pronounced by the county court is founded entirely on the ground that the vendor's lien has been made out against both of the defendants.

To sustain such a decree, it is necessary it should appear that either Eyler was insolvent or that the complainant had exhausted all his other remedies before he filed his bill. *Pratt v. Vanwyck*, 6 Gill & J. 496, and *Richardson v. Stillinger*, 12 Id. 477, are sufficient authority for this doctrine.

The question then is, Has the complainant established either of these propositions? We think not. The complainant does not aver that he had exhausted his remedies against Eyler before he filed his bill against both of the defendants; but this omission, since the act of 1832, would not prejudice his case before this court, provided there was proof to show the fact, no exception

having been taken to the sufficiency of the averments of the bill in the court below.

But as the case is presented by the record, there is no proof of either of the essentials to the sustentation of this proceeding. It is true, the bill refers to and makes an exhibit of a former proceeding in equity against Eyler, but the record of that suit is not proven under the commission, nor is it certified to under the seal of the clerk of the court. The answers of the defendants are silent in regard to it, and this silence imposed on the complainant the obligation to establish the verity of the record, and this he has failed to do: *Warfield v. Gambrill*, 1 Gill & J. 503.

The proof of the insolvency of Eyler, apart from the proceedings in equity against him, it is contended, is to be discovered in the short copy of *fi. fas.*, with entry of *nulla bona* thereon, to be found in the record. It does not appear when or how these papers were introduced into the case. But it is supposed that as there was no objection urged to this proof, it is too late now to interpose any. We think not; to such a case, the act of 1832 does not apply: *Stockett v. Jones*, 10 Gill & J. 276.

The case, without affirming or reversing the decree of the county court, will be remanded for further proceedings; but as the act of 1832 makes it the duty of this court to express its opinion on the merits of the cause and to give directions to the court to which the record shall be remanded, we state, that had the record in the former proceeding been duly verified, or had the evidence of returns of *nulla bona* to the writ of *feri facias* been properly introduced into the case, we should have felt bound to have affirmed the decree of the county court, there having been no exception taken to the insufficiency of the averments of the bill.

Entertaining these views, we deem it unnecessary to advert to the other questions raised in the cause, satisfied that if the deficiencies alluded to be supplied, that the complainant below will secure the object of his proceeding.

Cause remanded, under act of 1832, c. 302, for further proceedings.

THE PRINCIPAL CASE WAS CITED in *Warner v. Dove*, 33 Md. 579, to the point that mere short copies of judgments confessed by the husband, but not proven under the commission, and which had been filed with the bill as exhibits, were not sufficient proof of the husband's indebtedness as against the answer of his wife.

AUTHENTICATION OF TRANSCRIPT OF JUDGMENT, WHEN EVIDENCE: *McRae v. Stokes*, 37 Am. Dec. 698; *Merrivether v. Garvin*, 27 Id. 650; *Adams v. Lisher*, 25 Id. 102; *West v. McConnell*, Id. 191.

BUEL v. PUMPHREY.

[2 MARYLAND, 261.]

PLAINTIFF IN ACTION OF TROVER MAY MAKE DEMAND BY AGENT.

NO DEMAND AND REFUSAL ARE NECESSARY IN ACTION OF TROVER where there has been a tortious taking and conversion; otherwise if the possession was at first legal, and the holding afterwards tortious.

DECLARATION THAT PARTY "WILL NOT DELIVER THE GOODS TO ANY PERSON whatsoever," when a demand has been made, will be deemed a refusal, and, *quoad* such goods, a conversion.

APPEAL from Prince George's county court. The facts are sufficiently stated in the opinion.

Digges and Causin, for the appellant.

Thomas F. Bowie, for the appellee.

By Court, LE GRAND, C. J. This is an action of trover, instituted to recover the value of a negro woman. The plaintiff, after having proved property in the woman, proved that his agent, in August, 1847, went to the residence of the defendant with an order demanding that the woman should be delivered to him as agent of the plaintiff; that the defendant said at first that the plaintiff had the right to take her away at any time, but afterwards (he in the mean time having had a conversation with his wife) refused to deliver her up, saying that if he, the "defendant, did not get her, she should never be of service to Pumphrey (the plaintiff) or any one else." It also appears from the testimony at the time of the presentation of the order of the plaintiff to the defendant, the agent told the defendant he had purchased the woman for his sister-in-law, who resided in Washington. It also was given in evidence, that some days after the interview of the agent with the defendant, the plaintiff went to the residence of the defendant to get the woman, but that she made her escape, and that he subsequently advertised her.

On this state of facts, the defendant presented to the county court four prayers, all of which were rejected, and it is from this refusal of the court that the appeal has been taken.

The first and third prayers are, in substance, the same, and present the same question. They ask the court to instruct the jury, that although they may find a demand and refusal, yet such demand and refusal are insufficient if the jury should also find

that the agent represented himself as owner of the woman, and as such was dealt with by the defendant.

It appears from the testimony of the agent that he carried with him an order of the plaintiff to the defendant to deliver up the woman, and from the testimony of the witness Burgess, that he was present at the beginning of the interview between the agent and defendant, and that the agent handed a paper to the defendant, at which the latter looked. It is clear from this evidence that the defendant was duly notified, in writing, of the demand of the plaintiff. At all events, these circumstances were sufficient to justify the jury in finding the fact of a demand by and on behalf of the plaintiff. Whatever may have been the representations of the agent, it is, on the evidence, beyond all dispute that, in point of fact, he had not purchased the woman.

The ground on which the defendant's counsel rest these prayers is, that the demand should have been made on behalf of the plaintiff, whereas, they insist the evidence authorized the jury in finding that the demand was made on behalf of the agent, who had during a part of the conversation said he had purchased the woman from the plaintiff.

It is undoubtedly true that if the bailor sell during a bailment, the purchaser, and not the bailor, is the party, after sale, to demand the goods of the bailee, and on refusal to bring trover: *Philips v. Robinson*, 4 Bing. 106; S. C., 13 Eng. Com. L. 422.

But it is equally clear, if goods be sold and before they are delivered they come into possession of another, who refuses on demand to deliver them up either to the purchaser or seller, that such refusal, or a rescinding of the contract of sale, will enable the vendor to maintain trover: *Pattison v. Robinson*, 5 Mau. & Sel. 105.

In the case just referred to, the person in whose possession the goods were on demand informed the parties "he would not deliver the goods to any person whatsoever," which, in this particular, is precisely the case now before the court. And in that case Lord Ellenborough said that after such a declaration it must be taken that the defendant meant to give a refusal both to seller and purchaser, so far as they were concerned, and resembled, therefore, the case where a party declares beforehand that if a tender is made to him he will not accept it, which dispenses with the necessity of a formal tender. He further observed that he did not think it necessary to inquire whether the

declaration of the defendant might not be considered as a continuing conversion, because there was at the time a conversion to the several parties then interested by a refusal to give effect to their contract; that there was no objection to the title of the one party to sell and of the other to purchase, and therefore, *quoad* them, the refusal amounted to a conversion.

This being so, it is wholly immaterial whether the defendant believed the woman still to be the property of the plaintiff or of the agent who presented the order for her delivery. The manner of his refusal, to use the language of the case we have last referred to, "inured for all purposes to the one party and the other." We concur with the county court in the rejection of these prayers.

The fourth prayer is disposed of by the same reasoning, for it is but a demurrer to the sufficiency of the evidence to establish a conversion of the property.

The third prayer rests upon the ground of waiver, which is deduced from the facts, if the jury should find them, of the plaintiff after the demand endeavoring to take possession of the negro, her escape, and his subsequently offering a reward for her apprehension.

We have already said that the refusal of the defendant was a conversion from the time it was made.

There is no question presented to us in regard to the damages, and therefore the case of *Hewes v. Parkman*, 20 Pick. 90, can have no bearing on the matter before the court. In that case the court however recognized the doctrine, that where goods wrongfully converted are afterwards returned, trover will still lie, though if the goods were returned speedily and in as good plight as when taken, the damages would be merely nominal. The prayer makes no question as to the amount of damages, but goes to defeat the right of action. We think the county court did right in rejecting it.

Judgment affirmed.

DEMAND UNNECESSARY IN TROVER, when there has been an actual conversion: See *Houston v. Dyche*, 33 Am. Dec. 130; *Pattee v. Gilmore*, 45 Id. 385, and notes.

REFUSAL TO DELIVER PROPERTY IS EVIDENCE OF CONVERSION: *Dezell v. Odell*, 38 Am. Dec. 628; *Thompson v. Rose*, 41 Id. 121; *Hawkins v. Hoffman*, Id. 767; *Pattee v. Gilmore*, 45 Id. 385; *Holbrook v. Wight*, 35 Id. 607, and notes.

THE PRINCIPAL CASE WAS APPROVED in *Shannon v. Howard Mutual Building Association*, 36 Md. 392.

NEWCOMER v. OREM.

[2 MARYLAND, 297.]

RIGHTS OF HUSBAND AND WIFE IN IMMOVABLE PROPERTY BELONGING TO EITHER is governed by the law of the place where it is situated.

IN MARYLAND, TRANSMUTATION FROM REALTY TO PERSONALTY, under a commissioners' sale, is complete when the sale is ratified and the purchaser has complied with the terms of it.

DEBT IS NOT CORPUS CAPABLE OF LOCAL POSITION, consequently it attaches to the person of the creditor, though its payment is secured by an hypothecation upon immovable property.

RENTS AND INCOME OF REAL ESTATE BEQUEATHED TO WOMAN, WHO AFTERWARDS MARRIES and dies childless, will upon her death go to her brothers and sisters in preference to her husband.

APPEAL from Talbot county court. Action of *assumpsit*, brought by Nicholas Orem, legal representative of Maria Orem, deceased, against David C. Newcomer. The following are the facts: William Blunt, of Louisiana, died in 1833, and by his will directed his executors to keep his estates, real and personal, together for three years, and then sell and dispose of the same. In 1837 his estate was sold by order of a parish judge of that state for three hundred and ninety-three thousand dollars. After payment of the debts, legacies, etc., the part which went to the parties entitled to the succession was one hundred and thirty-one thousand dollars—of which amount Maria Orem, plaintiff's wife, was entitled to eighteen thousand seven hundred and fourteen dollars. The mortgage, given to secure a part of the notes for the purchase money at the sale was foreclosed, and the property bought in by the defendant for the heirs of the testator, including the plaintiff's wife, the plaintiff taking no interest or estate in the property so purchased. It so remained, the parties interested, including plaintiff's wife, receiving their respective portions of the rents up to her death, in 1844. Another mortgage, given to secure the other portion of the notes for the purchase money, was not foreclosed until 1846, after the death of the plaintiff's wife. Plaintiff brought his suit to recover two thousand five hundred and seventy-two dollars and thirty-eight cents, alleged to be due as his deceased wife's share of the rents arising from the estate after her death, and which had not been paid to him as her legal representative. The court rendered a *pro forma* judgment in favor of the plaintiff for twenty thousand dollars, besides the damages alleged in the declaration, and costs. Defendant appealed.

Nelson, for the plaintiff.

McLean and Alexander, for the defendant.

By Court, TUCK, J. It is a material fact in this cause that the appellee and his wife were married, and always resided in Maryland, as his rights, in a great degree, depend on the law of their domicile. A statement of the principles applicable to such questions will serve to guide us in tracing and defining the interests of Mrs. Orem in William Blunt's estate, down to the commencement of this suit. "Where there is no express marriage contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, and that they accompany the person. As to immovable property, the law *rei sitæ* will prevail. Where there is no change of domicile, the same rule will apply to future acquisitions, as to present property:" Story's Conf. L., secs. 186, 187. And it is also a well-established principle, that the right and succession to personalty must depend on the law of the domicile. But the law of the place where the property is found must be appealed to in determining whether the estate in question is movable or immovable. That being settled, the former passes according to the law of domicile, and the latter according to the *lex rei sitæ*: *Id.*, secs. 447, 481-483.

If, therefore, any part of the fund in controversy was personal at the death of Mrs. Orem, and was not affected by any real law of the state of Louisiana, that is to say, by any law operating upon property, which is the distinction there made (whether the property be real or personal), the plaintiff below must recover in respect to such portion.

It is unnecessary to inquire whether the direction in the will of William Blunt, for the sale of the property, effected a conversion or not; because, in our opinion, that change took place by the sales in 1837, and the division of the notes of the purchasers among the parties entitled, if not before. The counsel for the appellant relies on the case *Hooke v. Hooke*, 14 La. 22, to show that such effect was not produced by these proceedings in the present case. The cases are parallel down to the receipt of the notes by the officer making the sale. But in the one cited, either the notes or the money was brought into court, and at the time the question arose were undivided. And the court said: "The licitation to effect a partition, although it vested the title in the purchaser, was not a sale as between the

heirs; it was merely one of the acts of partition. That act did not change the nature of the property to be divided; and as the children of the first marriage died while that property still remained in a state of indivision, the rights of the defendants were the same as if no licitation had taken place." The question there was, whether the shares of two of the heirs who had died in another state pending the proceedings should descend according to the law of their domicile, or according to that of the place where the real estate was located. The latter law was allowed to prevail, because the fund was immovable, not having been divided. But this case is different. The statement shows that the heirs and devisees of William Blunt, by their agent, were present at and became parties vendors to the sale, and that the heirs of James R. Blunt received, by their agent, their shares of the proceeds of sale, in the notes of the purchasers, which were secured by mortgages on the estates. This sale and receipt of notes changed the legacies into personal demands against the purchasers. It was decided in the case of *State v. Krebs*, 6 Har. & J. 31, that under a commissioners' sale in this state "the mutation from realty to personalty may be determined to be complete when the sale is ratified and the purchaser has complied with the terms of it by paying the money, if for cash, or by giving bonds to the representatives if the sale is on credit;" and that such bond, passed to a wife, is a chose in action. The notes in this case were made "payable to the heirs of the succession of William Blunt," and the heirs of James R. Blunt, taking *per stirpes*, received notes to the amount of their interest. We suppose that a ratification of the sale can not be necessary when the sale is made by the parish judge himself, and not by commissioners or a trustee, as in this state.

The property having undergone this change, we are of opinion that the interest of Mrs. Orem ceased to be governed by the laws of Louisiana, and became subject to those of their domicile, by virtue of which the husband is the owner of the wife's choses in action, subject to the rights of survivorship. This appears to be consistent with the decision in the case of *Packwood's Succession*, 9 Rob. (La.) 438 [41 Am. Dec. 341], where a wife removed to New York after having acquired an interest in the community of acquets and gains during her residence in Louisiana. She died in New York, and the court held that the price or value of her share of the community, which her husband had sold during her life-time, was a debt due from the husband to her estate; but that it was due to her in New York

and not in Louisiana, and could not be administered as part of her estate in Louisiana, because it attached itself to her at her domicile, and was distributable according to the laws of New York. It had been merged in a debt which was subject to the controlling influence of the laws of their common domicile. In contemplation of law, it was not in Louisiana at the time of Mrs. Packwood's death. If a crop raised on the property belonging to the community had been on the place unsold, it may have been likewise common; but its proceeds in money could not be put down as part of her estate to be administered in Louisiana. It must be remembered that by the laws of that state those which govern and regulate the community of acquets and gains are considered real laws. And yet, in the case quoted, the proceeds of the crop were not considered as real or immovable, because the moment their identity was merged in a debt the right to the debt was governed by the law of the state where the creditor resided. And so in the case of *Hicks v. Pope*, 8 La. 554, where a married woman, residing in Louisiana, became entitled to a negro in Alabama by the death of her father, it was held that the question of property, as between the husband and wife, was to be settled by the laws of their domicile. This was said to be a necessary consequence of the doctrine, "that in domicilii loco mobilia intelliguntur existere."

We do not find anything in the code that regulates the conversion of estates; but it would seem by article 466 that obligations for the payment of money, though accompanied by mortgage, are movable. No distinction appears to have been drawn between obligations arising from transactions in regard to movables and immovables; nor any provision introduced by which debts, originating in any source, are made the subject of real laws. Justice Story says, Conf. L., sec. 399: "In fact, a debt is not a *corpus*, capable of local position, but purely a *jus incorporale*." And he quotes, with approbation, with Livermore's Dissertations, a passage illustrative of these principles: "It was formerly doubted by some whether personal actions should be considered as movable, and whether they should not be considered to have a location in the domicile of the debtor. But the common opinion seems to be well settled that, considered actively and with respect to the interest of the creditor and his representatives, they must be considered as attached to the person of the creditor; and this, although the payment of the debt is secured by an hypothecation upon an immovable property."

Having shown, as we think, that the interest of Mrs. Orem in William Blunt's estate became a debt against the purchasers, and that that debt immediately attached itself to the person of her husband, as an incident of the marriage, let us next inquire how it stood at the commencement of this suit. In 1841 the mortgage on the Catahoula estate was foreclosed, and the property bought in the name and for the heirs of William Blunt, including Mrs. Orem. It nowhere appears that the plaintiff took any interest or estate in the property so purchased. In this condition it has remained, as far as we are informed, until this time; the parties entitled, including Mr. and Mrs. Orem, receiving their respective shares of the rents and income, up to the period of her death in 1844. This property being real, and having been purchased in the names of the heirs, including Mrs. Orem, in her life-time, we are of opinion that the rents and income since her death must go to her brothers and sisters, and not to the plaintiff as surviving husband: Civ. Code of La., arts. 908, 918.

The statement of facts, however, leaves the other estate, or rather the notes received on the sale of the Concordia estate, in a different predicament. Mrs. Orem died in 1844. The mortgage on this estate was foreclosed in 1846, and the property purchased in the name and for the heirs, and afterwards resold for thirty thousand dollars, fifteen thousand of which were invested in another estate. If this debt belonged to the plaintiff in right of his wife, as we suppose, he was entitled to the proceeds of sale when the claim was realized by a sale of the property, and the money or proceeds being his, the investment of part thereof in other estate must also inure to his benefit. The plaintiff is therefore entitled to judgment for five hundred and thirty-three dollars and forty-one cents, for proceeds of sales of this estate made to Sanderson. We do not award him any part of the sum said to be in hand for rents and income, because that amount must have accrued from the land that was sold to Lyle, and afterwards purchased for the heirs in 1841. The Concordia estate was not sold until January, 1846; this suit was commenced in May of that year, and it is not probable that any rents or income had then been received from the land that was purchased by a part of the proceeds of said sales.

The disposition of the sum of two hundred dollars, said to have "arisen from the same sources," would depend on the principles heretofore stated, if we could determine how much was received from the sales of the Wakefield property, and what

amount on account of rents and income of the Hope estate. In the absence of distinct averments on these points, we do not embrace that sum in our judgment.

In the examination of this case we have considered it as unaffected by the argument of the counsel, in reference to the regulations of the code upon paraphernal and community property. The cases referred to by the appellee's counsel do not apply to one like the present. *Saul v. His Creditors*, 5 Mart., N. S., 569 [16 Am. Dec. 212], and *Cole's Widow v. His Executors*, 7 Id. 41 [18 Am. Dec. 241], were decided upon marriages contracted while the *fucro real*—a law of Spain—was in force. Under this law it was immaterial where the parties to the marriage resided. But it was repealed in 1828, since which there is no community of acquests and gains between husband and wife, as to property found in that state at the dissolution of the marriage, unless the parties reside there: *Dixon v. Dixon*, 4 La. 188; note to *Cole's Widow v. His Executors*, 4 La. Cond. Rep. 148.

And as to paraphernal estate, we do not find any article in the code, or decision, which declares that the law regulating such property is real, or exempts it from the general rule of public law to which we have referred, which subjects personalty to the control of the law of the domicile. If the parties to the marriage had resided in Louisiana, the case probably would have been subject to a different conclusion; but in a case like the present, her laws can not have any extraterritorial influence over personal estate.

The discussion of the principles involved in the cause was attended with great embarrassment, in consequence of the difficulty of expounding the laws of another state so different from our own. But we think that the conclusions to which we have arrived are warranted by the code, and adjudged cases of that state, and the acknowledged rules of public law applicable to such questions.

Judgment reversed, and judgment for the appellee for five hundred and thirty-three dollars and forty-one cents, and interest from May 16, 1846, and costs to the appellant in this court.

SUCCESSION OF REALTY IS GOVERNED BY LAWS OF PLACE where the same is situated; that of personal property by the laws of the domicile: *McCullum v. Smith*, 33 Am. Dec. 147; *Kneeland v. Ensley*, Id. 168; *Chapman v. Robertson*, 31 Id. 264; *Beaufort, Adm'r, v. Collier*, 44 Id. 321.

THE PRINCIPAL CASE WAS AFFIRMED in *Peacock v. Pembroke*, 4 Md. 283, and *Noonan v. Kemp*, 34 Id. 78.

WRIGHT v. WRIGHT'S LESSEE.

[2 MARYLAND, 429.]

DIVORCE A VINCULO MATRIMONII BY LEGISLATIVE ENACTMENT is a constitutional and valid exercise of legislative authority.

LEGISLATIVE ENACTMENT AUTHORIZING COURT OF EQUITY TO DECREE DIVORCES in certain cases does not divest the legislature of all power over that subject, nor does it give courts of equity exclusive jurisdiction over it.

GRANTING DIVORCE BEING BUT REGULAR EXERCISE OF LEGISLATIVE POWER, it is not within the jurisdiction of the judiciary to pronounce the act null and void.

IN PASSING LEGISLATIVE ENACTMENT, the law-making power but announces its will as defined by the constitution. The legal consequences resulting from the act are to be determined by the judiciary.

WHERE ACT PASSED IS BUT REGULAR EXERCISE OF LEGISLATIVE POWER, notice to the party to be affected by the same is held to be unnecessary.

COURT WILL PRESUME THAT ACTION OF CO-ORDINATE BRANCH OF GOVERNMENT has been done within the constitutional limits.

SEVERAL CO-ORDINATE DEPARTMENTS OF GOVERNMENT ARE SUPREME and uncontrollable within the particular limits assigned to each.

ONE LEGISLATURE CAN NOT LIMIT POWER OF SUCCEEDING LEGISLATURES. "JUDGMENT OF HIS PEERS" means a trial by jury.

"LAW OF THE LAND" means due process of law according to the course and usage of the common law.

MARYLAND BILL OF RIGHTS CONSTRUED.

LEGISLATIVE ACT DIVORCING PARTIES RESTORES TO WIFE the real estate of which she was seised at the time of the marriage, and which had not been conveyed away during coverture by the joint act of herself and husband.

APPEAL from Queen Anne's county court. The facts are stated in the opinion.

Robinson and Hopper, for the appellant.

Emory and Pearce, for the appellee.

By Court, LE GRAND, C. J. This was an action of ejectment instituted in Queen Anne's county court to recover a tract of land. It was tried on a statement of facts, and judgment rendered by the court below in favor of the appellee. The statement of facts is as follows:

"It is admitted by counsel for plaintiff and defendant that a patent regularly issued for the tract of land mentioned in the declaration filed in the above cause; that a certain Robert Gardner was seised in fee of the land, at the time of his death in the year 1828; that the said Robert died intestate of said land, etc.;

that the same descended at his death to his daughter, the plaintiff in this cause, who was his only child and heir at law; that the said Jane, after the death of the said Robert, entered upon and was seised in fee of the said land, and so continued to be seised in fee of the same; that on the tenth day of May, in the year 1835, the said Jane intermarried with Samuel J. Wright of Queen Anne's county; that the said Jane and Samuel lived together after their marriage for many years, but that there never was any issue of the said marriage; that the said Samuel has held possession of the land aforesaid from the time of the said marriage to the present time; that on the twenty-ninth of April, 1845, the said Jane exhibited in Queen Anne's county court, sitting as a court of equity, a bill against the said Samuel J. Wright, praying to be divorced from him the said Samuel, and to be restored the possession and enjoyment of her maiden property, real and personal; to which said bill the said Samuel filed his answer in said court, on the sixteenth of July, in the same year 1845; and in which said case no further proceedings were had until the May term of said court, in the year 1849, when the said Jane ordered the same to be dismissed; that at December session, 1849, the said Jane presented to the general assembly of Maryland her petition, praying for a divorce, which petition set forth the facts hereinbefore stated, and alleged the adultery of her said husband, and his desertion of the said Jane for several years; and that at the said session of the general assembly of 1849 a bill was passed divorcing the said Jane from the said Samuel, as follows: 'An act to divorce Jane E. Wright, of Queen Anne's county, from her husband, Samuel J. Wright. Be it enacted by the general assembly of Maryland, that Jane E. Wright, of Queen Anne's county, be and she is hereby divorced from her husband, Samuel J. Wright, *a vinculo matrimonii*.' That no notice of the said proceedings before and by the said legislature was given to the said Samuel; that the said Samuel never had, nor has he now, any interest in the said land other than such right or possession as he acquired by virtue of the said marriage; and that he has never made any provision for the support and maintenance of the said Jane. That the said Samuel J. Wright is in possession of the said land."

The first question which arises out of this state of facts involves the right of the legislature to pass the act of 1849.

It is said that since the passage of the act of 1841, c. 262, the legislature has been incompetent to take cognizance of cases

of divorce, and that all authority over such matters was by that act exclusively vested in the high court of chancery and the courts of equity. If this be so, then the act of 1849 was and is unconstitutional and void.

According to the earlier law of England, a marriage valid at the time of its solemnization was held to be indissoluble. Conjugal infidelity only furnished a ground for separation, but nothing short of death could release the nuptial bond. A complete annulment of the tie could only be obtained by the establishment of some antecedent impediment, such as undue consanguinity, physical incompetence, or mental incapacity. Until about the commencement of the eighteenth century the ecclesiastical courts exercised exclusive jurisdiction over the subject of divorces. The ecclesiastical courts refusing to grant divorces *a vinculo*, even in cases of the grossest conjugal delinquency, induced applications to parliament, and it is said the first genuine example of a dissolution of the nuptial tie was in the case of the notorious mother of the highly gifted but unfortunate poet, Savage—the Countess of Macclesfield. Since that time the parliament have exerted the power of annulling, absolutely, the marriage bond.

In the case of *Crane v. Meginnis*, 1 Gill & J. 474 [19 Am. Dec. 237], the constitutional power of the legislature, under the old form of government, to grant divorces was fully recognized. "Divorces," say the court in that case, "in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of legislative power." This exercise of power may have grown out of the circumstance of there being no ecclesiastical courts within the limits of Maryland, or may have been borrowed, by analogy, from the action of the British parliament, which, from the commencement of the eighteenth century, exercised the power of granting divorces *a vinculo*, for causes supervenient the marriage.

The granting of divorces being but a "regular exercise of legislative power," the next inquiry is, What effect had the act of 1841, c. 262, on that legislative power?

The first section of the act provides, that from and after its passage "the chancellor, or any court of this state, as a court of equity, shall have jurisdiction of all applications for divorces;" and the second section specifies the grounds on which divorces *a vinculo matrimonii* may be granted. They are, first, the impotence of either party at the time of the marriage; secondly, for

any cause which, by the laws of this state, renders a marriage null and void *ab initio*; thirdly, for adultery; fourthly, where the party complained against has abandoned the party complaining, and has remained absent from the state five years. By the act of 1844, c. 306, the courts are authorized to decree divorces in cases where the abandonment has continued uninterruptedly for three years.

It is contended, on the part of the appellant, that this legislation divested the general assembly of all power over the subject, and gave an exclusive jurisdiction to the chancellor and the county courts, sitting as courts of equity. In this view we do not concur.

The delegation of authority to the courts to act in certain enumerated cases does not necessarily involve the negation of a reservation of power to the legislature to act either in the same or in other and a different class of cases. The acts of 1841 and 1844 were, at all times after their passage, subjects of legislative revision and repeal. It was competent for that branch of the government to repeal them in whole or in part, or to suspend for a time their operation. Whenever, therefore, the legislature granted a divorce for any of the causes mentioned in those acts, they were *pro tanto* repealed. Except in the case of a grant or other contract, there is no constitutional power residing in one legislature to limit the power of succeeding legislatures. Within the purview of the constitution—with the exception we have mentioned—all legislatures are co-equal; what one may do, a succeeding one may also do or undo. If this were not so, in the very nature of things, it would be within the power of the legislature at one session to exhaust or part with the whole law-making power of the state. The organization of society, no less than the constitution, contemplates the existence of the legislative power as indestructible, and as co-existent with itself and the organic law.

The argument of counsel for the appellant sought to deduce from the case of *Crane v. Meginnis*, *supra*, principles in opposition to those which we have just announced. It was urged by them, that inasmuch as the legislature, in the year 1777, authorized the chancellor to hear and determine all causes for alimony, in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there, and inasmuch as the court determined that part of the act of 1823 which gave alimony to the wife to be unconstitutional, by a parity of reasoning, since the act of 1841, such an

act as that of 1849, divorcing the appellee from her husband, ought to be regarded and held as unconstitutional and void. We think the learned counsel have wholly misconceived the grounds of the decision of the court in that case. After disposing of the question involving the right of the legislature to grant divorces, they observe: "The suit for alimony in this state, as in Great Britain, is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial tribunals;" and they go on to remark, that so early as the year 1689, in the case of *Galwith v. Galwith*, 4 Har. & M. 477, it was asserted in the supreme court of the province, that alimony is only recoverable in chancery or the court of the ordinary. The court evidently regarded the act of 1777 as but affirming the law of remedy as it had previously existed; declaring the allowance of alimony always to have been a judicial, and the granting of divorces within this state as a regular, exercise of legislative power. See also *Helms v. Franciscus*, 2 Bland Ch. 566 [20 Am. Dec. 402].

Whilst we have no doubt on the general proposition that the legislature, since the passage of the act of 1841, possessed the power to divorce man and wife, it is manifest, under the statement of facts in the case now before us, that we must regard the act of 1849 as constitutional and valid.

Independently of the acts conferring jurisdiction on the courts in matters of divorce, the power of the legislature has not been questioned. And it has not been contended that the acts of 1841 and 1844 conferred on the courts jurisdiction in cases other than those specifically enumerated in them. Now, this case comes before us on a case stated, and it is not allowed to this court to draw inferences of fact from those contained in the agreed statement, no such power having been given by the assent of the parties.

The act of 1849, divorcing the parties, nowhere states the grounds on which the legislature passed it. It is true, the statement of facts shows that the wife in her petition alleged the adultery and desertion of her husband for several years. Now, were it even conceded that the legislature had parted with all jurisdiction in cases like those enumerated in the acts of 1841 and 1844, *non constat* the case in which it acted was of that character. The desertion may have been for a number of years less than that for which the courts are empowered to grant a divorce *a vinculo*, and if so, in any aspect of the argument of the coun-

sel for the appellant, the legislature had jurisdiction of the subject. In the absence of all evidence to the contrary, we are to assume the action of a co-ordinate branch of the government has been within the limits prescribed by the constitution.

But, it is said, however this may be, the act is nevertheless null and void, because no notice was given to the husband of the application of the wife to the general assembly. The acts of 1829, c. 202, and 1840, c. 238, authorize notice to be given to the party whose marital relations are proposed to be changed. So far as they are concerned, the observations we have made in regard to the repeal *pro tanto* of the act of 1841 are equally applicable to them. But the objection to which we now refer is founded on a different principle; that is, that it would be contrary to the first principles of justice to bind a person by an action when he had no notice any such was in contemplation. As a general proposition, this is undoubtedly true, and accordingly it has been held that a party can not be personally bound by a judgment when he has not been summoned or had notice of the proceedings: *Kilburn v. Woodworth*, 5 Johns. 37 [4 Am. Dec. 321]. But the rule is different where the judgment operates *in rem*. It is also true, that all judgments rendered in any court against a party who had no notice of the proceeding are void, and that sentences obtained by collusion are mere nullities, and that all other courts may examine into facts upon which a judgment has been obtained by fraud: 2 Kent's Com. 108. The case, however, of legislative action is entirely different. If the passage of a particular act be but a "regular exercise of legislative power," notice is unnecessary. The legislature may of its own motion, without suggestion from or to any other body or person, exercise the power with which it is endowed by the constitution. In this particular, the exertion of its powers is distinguished from that of those of the judicial branch of the government.

By the twenty-first section of the bill of rights of Maryland of 1776, it was declared "that no free man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land."

Under this section of the bill of rights, a person may be imprisoned, disseised of his freehold, etc., provided it be done by the judgment of his peers or by the law of the land.

The words "by the judgment of his peers" mean a trial by jury, and the words "by the law of the land," which are copied from Magna Charta, are understood to mean due process of law, according to the course and usage of the common law: 2 Kent's Com. 13; *Regents of University v. Williams*, 9 Gill & J. 412 [31 Am. Dec. 72]; *Harness v. Chesapeake etc. Can. Co.*, 1 Md. Ch. 252. By the third section of the bill of rights, the inhabitants of Maryland are declared to be entitled to the common law of England, "subject, nevertheless, to the revision of and amendment or repeal by the legislature of this state." And by the sixth section of the same instrument it is said, "the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." The evident purpose of the declaration last quoted is to parcel out and separate the powers of government, and to confide particular classes of them to particular branches of the supreme authority. That is to say, such of them as are judicial in their character to the judiciary, such as are legislative to the legislature, and such as are executive in their nature to the executive. Within the particular limits assigned to each, they are supreme and uncontrollable. If, therefore, it be but a "regular exercise of legislative power" for the general assembly to pass an act of divorce, it is not within the authority of the judiciary to pronounce its action in the premises null and void. In the passage of such an act, the legislative branch of the government but announces its will as it is authorized to do by the constitution, and there its power ceases. The legal consequences flowing from such a legislative declaration it is for the judiciary to determine. The legislature has annulled the marriage of the parties to this suit. This we have seen they had the constitutional right to do. It has not undertaken to deal with questions of property; if it had attempted to have done so, such attempt would have been an assumption of power unauthorized by the constitution. It has simply divorced the parties. All questions involving rights to property they have submitted to the judicial branch of the government for its ascertainment. When the interposition of that authority is invoked, as it is in this case, the parties are entitled to be heard, and to have their respective rights ascertained, according to the due course of the "law of the land."

This being so, the question is, What are the rights of the former husband of the appellee?

The statement of facts informs us that the appellee, before and at the time of her marriage, was seised in fee of the land in

question, and that her former husband never had, nor has he now, any interest in the land other than such right or possession as he acquired by virtue of his marriage. It also is admitted there was no issue of the marriage.

In regard to the rights of either the husband or wife after divorce, we are not enlightened by any decisions on the subject in England since parliament assumed and has exercised the power to annul marriages; and the reason of this, as we are told by Macqueen on Husband and Wife, 210, 49 Law Lib. 138, is, that it is the settled usage of parliament to introduce certain clauses, which may be called property clauses, in order to regulate the rights and liabilities of the parties after the nuptial tie has been dissolved.

In volume 1, chapter 1, page 3, of Roper on Husband and Wife, it is said: "By the intermarriage the husband acquires a freehold interest during the joint lives of himself and wife in all such freehold property of inheritance as she was seised of at that time or may become so during the coverture."

This is undoubtedly true, if the author is to be understood as meaning that he becomes so entitled in right of the wife so long as the coverture lasts; but if he is to be understood as asserting that by virtue of the marriage alone he acquires a freehold estate in his own right for the joint lives of himself and wife, regardless of the cessation of the coverture, we do not concur with him, nor do the authorities upon which he relies sustain him. Among them is Co. Lit. 351, where Lord Coke quaintly observes: "It is good to be seen what things are given to the husband by marriage. First, it appeareth here by Littleton, that if a man taketh to wife a woman seised in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter, and yet the estate which the husband gaineth dependeth upon uncertaintie, and consisteth in privitie, for if the wife be attainted of felony, the lord, by escheat, shall enter and put out the husband, otherwise it is if the felony be committed after issue had. Also, if the husband be attainted of felony, the king gaineth no freehold, but a pernanacie of the profits during the coverture, and the freehold remaineth in the wife." And in the same book, page 67, it is said, if the husband "hath issue by his wife, then he shall receive homage alone during the life of his wife, and the reason is, because he, by having of issue, is entitled to an estate for term of his own life, in his own right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But

if his wife die, then he hath only but an estate for life, and then he can not receive homage."

It is thus seen that the estate which the husband takes exists in privity, and when this ceases the estate must necessarily cease with it. Again, in the case put by Lord Coke, where the husband be attainted of felony, the king gains no freehold, but a mere pernaney during the coverture; when this ceases there can be no freehold in the husband nor any pernaney of the profits. And in *Greneley's Case*, 8 Co. 72, it was held, under the words of 32 Hen. VIII., c. 28, which provided that no fine, feoffment, or other act by the husband only, of any manors, lands, etc., of the inheritance or freehold of his wife, during coverture, should make any discontinuance, or be prejudicial to the wife or her heirs, by the death of such wife, but that issue of their two bodies might enter, that in all cases where the wife might have a *cui in vita* at common law, she should enter by force of the statute. And it is there expressly said: "If the husband aliens, and afterwards is divorced *causa græcontractus*, or any other divorce which dissolves the marriage *a vinculo matrimonii*, there the wife during the husband's life may enter; for the words of the act are, 'no fine, feoffment, etc, during coverture between them.' And although the statute saith, 'but that the same wife,' etc., that is, to be intended of her who was his wife at the time of the alienation; for when the husband dies, she is not then his wife, but she is called wife to describe the person only who shall enter; and it is not said in the statute that the wife shall enter after the death of her husband, but generally that she shall enter 'according to their right and title,' be it in the life of the husband after a divorce *a vinculo matrimonii*, or after his death."

Now, if the interest of the husband be existent only during coverture, then it is clear a divorce *a vinculo matrimonii* restores the wife to her estate as she had and enjoyed it prior to her marriage. It is supposed, however, that the case of *Stephens v. Totty*, Cro. Eliz. 908, establishes a different doctrine. The reverse is precisely the case. It was decided in that case, if a husband and wife are divorced *a mensa et thoro*, and a legacy is left to her, the husband may release it. Such a divorce was held not to dissolve the marriage absolutely, as would be the case of a divorce *a vinculo matrimonii*, and it was on this consideration held that the wife's legacy could be released by her husband, the divorce *a mensa et thoro* being nothing more than a separation.

The doctrine which we have announced has been held and recognized in the courts of several of the states of this Union. In the case of *Gould v. Webster*, 1 Tyler, 414, decided in 1802, the supreme court of Vermont declared the operation of a divorce *a vinculo matrimonii* to be to restore to the woman her interests entire in all the real estate which the husband held in her right by the intermarriage, and which by their joint act had not been legally conveyed during the coverture. And the same doctrine is held in *Mattocks v. Stearns*, 9 Vt. 326; *Starr v. Pease*, 8 Conn. 541; *Wheeler v. Hotchkiss*, 10 Id. 225; *Barber v. Root*, 10 Mass. 260. In the state of Massachusetts there was in force, at the time the decision reported in 10 Mass. 260, was made, a statute which authorized it, but the court held the doctrine independently of the statute.

On the whole, we are of opinion that the legislature was constitutionally competent to pass the act of 1849, and that the legal effect of that act was to restore to the wife the real estate of which she was seised at the time of the marriage, and which had not been conveyed away during coverture by the joint act of herself and husband.

It may not be deemed, it is to be hoped, officious for us to remark that legislation on the relative rights of divorced persons might be very properly had. We can very readily perceive that cases may arise in which it would be but sheer justice to secure to the husband the pernanacy of the profits of the whole or of a portion of the estate of the wife. This, however, is a question for the disposition of another branch of the government; we can only decide it according to the law as we find it.

Judgment affirmed.

TUCK, J., delivered a dissenting opinion.

LEGISLATURE HAS POWER TO GRANT DIVORCES: *Fornhill v. Murray*, 18 Am. Dec. 344; *Crane v. Meginnis*, 19 Id. 237.

LEGISLATURE MAY AT ANY TIME RESUME POWERS PREVIOUSLY DELEGATED by it to public agent: *Dyer v. Tuskalooza Bridge Co.*, 27 Am. Dec. 655; *State v. Dunn*, 12 Id. 25.

JUDICIARY MAY DECLARE ACT OF LEGISLATURE UNCONSTITUTIONAL: *Hoke v. Henderson*, 25 Am. Dec. 677; *Tate v. Bell*, 26 Id. 221.

STATUTES WILL BE PRESUMED TO BE CONSTITUTIONAL until the contrary clearly appears: *Adams v. Howe*, 7 Am. Dec. 216.

LEGISLATURE IS NOT SOVEREIGN. It is not the constituent of the courts, nor are they its agents. Any assumption by the legislature of the powers conferred on the judiciary is destitute of authority: *Jones v. Perry*, 30 Am. Dec. 430.

"LAW OF THE LAND" DEFINED: See *Wally's Heirs v. Kennedy*, 24 Am. Dec. 511, and note 539; *Taylor v. Porter*, 40 Id. 274.

THE PRINCIPAL CASE WAS APPROVED in the following cases: *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Harrison v. Harrison*, 22 Id. 493; *Mayor etc. v. Horn*, 26 Id. 207; *Smith's Lessee v. Devecmon*, 30 Id. 480; *Grove v. Todd*, 41 Id. 642.

WILES v. WILES.

[3 MARYLAND, 1.]

SUITABLE PROVISION FOR MAINTENANCE OF WIFE AND CHILDREN WILL BE REQUIRED to be made out of the wife's personal property by a court of equity, where its intervention is asked by the husband or his assignee to obtain possession thereof; and if the fund be under the control of the court, the wife may proceed by original bill.

WIFE'S EQUITY DOES NOT ATTACH UPON HER LEGAL CHOSSES IN ACTION, the aid of a court of equity not being required to enable her husband or his assignee to reduce them into possession; and the collection thereof by the latter will not be restrained until a suitable provision shall be made for the wife.

BILL in chancery by a married woman, seeking to restrain her husband's trustee in insolvency from collecting a certain promissory note, which had been made to her prior to her marriage, and praying for a suitable provision out of the note for herself and children. Further facts appear in the opinion. The injunction was refused and the bill dismissed, and the complainant appealed.

William J. Ross and McLean, for the appellant.

Joseph M. Palmer, for the appellee.

By Court, LE GRAND, C. J. There is no dispute in regard to the facts in this case. The bill, in substance, states—and its allegations are admitted by the answers and the agreement filed in the cause—that the appellant, at the time and prior to her marriage with the defendant Wiles, was the owner of a chose in action, due and owing to her by the defendant Ramsburg; that after the marriage and the birth of a child, her husband, on the twentieth day of September, 1849, applied for the benefit of the insolvent laws, and that the defendant Keller was appointed his permanent trustee. The bill also states that Wiles is wholly insolvent and unable to provide for the support of his wife and children, and that the note is the only means of support of complainant and her children; and that the trustee of her husband is seeking to recover this note, and prays an injunction to re-

strain the trustee from proceeding to collect the note, and for a suitable provision, out of said note, for herself and children.

The question for this court to determine is, whether she be entitled to the relief sought.

On the part of the appellant, it has been insisted that in all cases where the trustee of an insolvent debtor is seeking to recover the chose in action of a wife, not reduced into possession, and when it appears that the husband is insolvent and unable to support his wife and children, a court of equity will interfere and restrain the trustee by injunction, until he makes a suitable provision for the wife and her children.

There is no doubt of the general proposition, that where a husband or his assignee asks the intervention of a court of equity to obtain the possession of a wife's personal property, the court will require him to do what is equitable, by making a suitable provision out of it for her maintenance and that of her children; and if the fund be under the control of the court, she may proceed by original bill: *Duvall v. Farmers' Bank of Md.*, 4 Gill & J. 282 [23 Am. Dec. 558].

But the doctrine contended for on behalf of the appellant extends beyond this principle. It in substance asserts that a court of equity will restrain a husband or his assignee from collecting a legal chose in action, even where it is not necessary for him or his assignee to invoke the aid of a court of equity, until such time as a suitable provision be made for the wife. The propriety of such a doctrine is strongly urged by the reasoning of learned jurists, but we have not been able to find, with but one exception, that it has ever been so decided.

The subject has undergone a very full review in many cases, both in England and this country. The principal cases in which it has been considered in this country have been very carefully brought together in the notes to the case of *Murray v. Lord Elibank*, 65 Law Lib. 329.

Speaking of the wife's equity, Chancellor Kent, in volume 2, page 141, of his Commentaries, says: It "does not, according to the adjudged cases, attach, except upon that part of her personal property in action which the husband can not acquire without the assistance of a court of equity." And that "if the husband can acquire possession without a suit at law or in equity, or by a suit at law without the aid of chancery (except perhaps as to legacies and portions by will or inheritance), the husband will not be disturbed in the exercise of that right."

This, we take it, is the substance of the principles established

by the adjudged cases, both in England and this country. It is true that learned jurists have suggested the inquiry whether a court of chancery ought not on just principles to restrain the husband from availing himself of any means, either at law or equity, of possessing himself of the wife's personal property in action, until he makes a suitable provision for her. Indeed, some of the courts have gone so far as to say that if it were in their power to do so, and the circumstances of the case required it, they would enforce by their decision such a doctrine. But in none of the cases in which this opinion is expressed, with the exception of the case of *Bell v. Bell*, 1 Ga. 637, is the case presented which required the application of such a principle. They were all cases of which the court had an equitable cognizance; and it is clear, that whenever the jurisdiction of a court of equity properly and legitimately attaches to the fund or to the subject, it is competent to provide for the wife out of the fund. In all the cases, with the exception already mentioned, cited by the counsel of the appellant in support of his view, a court of equity, as such, had jurisdiction over the subject-matter. They were either cases of trust, of distributive shares, account, legacies, or where the husband had abandoned his wife, refusing to contribute to her support. In the latter case a court of chancery has the right to grant alimony, and until the assignee of the husband actually reduces into possession the choses in action of the wife, her right of survivorship exists, and a court of equity will interfere to provide her alimony, if her life has been such as to entitle her to its protection.

The case of *Bell v. Bell*, 1 Ga. 637, undoubtedly establishes the proposition that the wife's equity attaches upon her legal choses in action, and will be protected by a court of equity, irrespective of the necessity of its aid to enable the husband or his assignee to reduce them into possession. Although we fully appreciate the ability and legal erudition which the learned judge in that case employs to sustain his position, we are unable to agree with him in opinion as to the purport of the decisions on which he relies.

We have seen that Chancellor Kent has not deduced the same conclusion from the adjudged cases. And Mr. Clancy, whose authority is also invoked by the court in *Bell v. Bell*, *supra*, while he insists there is no just ground upon which a court of equity should decline to interfere in cases where the husband is seeking to recover the wife's legal choses in action, nevertheless admits that the prevalent spirit of the cases is against it: Clancy

on Married Women, b. 5, c. 2, pp. 466-470. We concur with the court in *Thomas v. Sheppard*, 2 McCord Ch. 36 [16 Am. Dec. 632], that however wise and proper such an exercise of power may be, it does not become the courts, from a spirit of knight-errantry, to extend the principle beyond its well-defined limits. That duty, if there be a necessity for its performance, belongs to the legislature.

But whatever may be the views of lawyers elsewhere, we consider the question settled in Maryland by the case of the *State v. Krebs*, 6 Har. & J. 31, in which it was distinctly held, "that wherever a husband can come at the estate of the wife, without the aid of a court of chancery, that court can not interfere in her behalf."

In the case now under consideration the chose in action is of a legal and not of an equitable character, and as such, the remedy of the husband, and consequently that of his trustee, under the insolvent law, to reduce it into possession, is in a court of law. In no manner is the aid of a court of equity required to effectuate this purpose. If the debtor had voluntarily paid it to the trustee, the latter would have been competent to have given a discharge. Under our insolvent system, on the application of the husband for its benefit, all his right passed to his trustee, and if he succeeds in reducing the particular chose involved in this controversy into possession, it will be distributed in a court of law, and not a court of equity: *Carter v. Dennison*, 7 Gill, 157; *Pierson v. Trail, Trustee of Miller*, 1 Md. 142.

Decree affirmed.

WIFE'S EQUITY TO SETTLEMENT.—A husband or his assignee will not be aided by a court of equity in obtaining possession of his wife's personal property or choses in action unless adequate provision is first made for her: *Duwall v. Farmers' Bank*, 23 Am. Dec. 558, and note collecting prior cases; *Thomas v. Sheppard*, 16 Id. 632; *Parsons v. Parsons*, 32 Id. 362; *Wilks v. Fitzpatrick*, 34 Id. 618; *Browning v. Headley*, 40 Id. 755; and a wife is entitled to a settlement out of the proceeds of her realty sold by order of court: *Daniel v. Daniel*, 44 Id. 244. The bill will be dismissed where all the property sought is not more than sufficient to make adequate provision for the wife: *Browning v. Headley*, *supra*. A husband's agreement, on receiving his wife's legacy, to invest it for her use is substituted for her equity, and may be specifically enforced against him for the benefit of the wife and children, though not named: *State v. Reigart*, 39 Id. 628. But where the husband has had possession of his wife's property and incumbered it, equity will not disincumber it and settle it on the wife: *Thomas v. Sheppard*, *supra*.

GILPIN v. HOLLINGSWORTH.

[3 MARYLAND, 190.]

TITLE PASSES BY DESCENT, AND NOT BY PURCHASE, the former being the worthier title, where the same quantity and quality of estate is devised that the devisee would have acquired by descent.

COPARCENARY AND ESTATES IN COMMON ARE RECOGNIZED AS DIFFERENT LEGAL ESTATES in Maryland, having different qualities and incidents.

TENANCY IN COMMON IS CREATED BY WILL by all expressions importing division by equal and unequal shares, or referring to the devisees as owners of respective or distinct interests, and even by words denoting equality.

TENANCY IN COMMON IS CREATED BY WILL, AND DEVISEES TAKE BY PURCHASE, AND NOT BY DESCENT, as the will does not pass the same estate in quality or quantity that they would have taken as heirs at law, where a testator devised "all the rest and residue of my estate * * * to be divided amongst all my children, in equal shares and portions, to them, their heirs and assigns, forever."

EJECTMENT brought to recover an undivided third part of a certain tract of land, of which one Henry Hollingsworth died seised in fee of his own right in 1803. Hollingsworth left two children, William and Mary, by his first wife, and four, Henry, Elizabeth, Hannah, and Anne, by his second wife; and under a division of the land devised to them by a residuary clause, given in the opinion, the land in dispute was conveyed to Anne. In March, 1850, Anne died, leaving as her sole heirs her sisters Mary and Elizabeth and the children of Hannah, her brothers William and Henry having died without issue. Anne's half-sister Mary died in November, 1850, leaving the plaintiffs, her children and heirs at law, and this action is brought by them against Elizabeth, and Hannah's children. Judgment was given for the defendants on the above statement of facts, and the plaintiffs appealed.

Grafton L. Dulaney, for the appellants.

Otho Scott, for the appellees.

By Court, TUCK, J. The will of Henry Hollingsworth contained the following clause: "All the rest and residue of my estate, real, personal, or mixed, whatsoever or wheresoever, I give, devise, and bequeath, to be divided amongst all my children, in equal shares and portions, to them, their heirs and assigns, forever." He left children of the whole and of the half blood. If his children took by descent, and not by purchase, the plaintiffs are entitled to recover, being of the half blood; if,

on the contrary, the property passed by the will, the defendants, being of the whole blood, must succeed.

“Where the same quantity and quality of estate is devised that the devisee would have acquired by descent, the title passes by the worthier title—by descent, and not by purchase.” *Medley v. Williams*, 7 Gill & J. 70; 2 Hilliard on Real Prop. 528, 529. The only inquiry, then, would seem to be, whether these devisees took the same estate as if their father had died intestate. Estates in joint tenancy, coparcenary, and in common are different from each other. We need not mention the well-recognized distinctions. It may be conceded, as contended in argument, that for most practical purposes in this country there is no real difference between coparceners and tenants in common, yet they are different as legal estates, and their qualities and incidents are not the same. Tenancies in common and joint tenancies are recognized by the act of 1822, c. 162; and estates in coparcenary by the court of appeals, in the case of *Hoffar v. Dement*, 5 Gill, 132 [46 Am. Dec. 628], where it is said: “In Maryland the children of parents who die intestate, seised in fee in lands, etc., take as coparceners, and are so treated by the act of 1820, c. 191, sec. 5.” The same principle applies to persons inheriting in virtue of the act of 1786, c. 45. They all constitute but one heir. Suppose, instead of the words employed in this clause, the will had devised this residue to the children as tenants in common, can it be doubted that they would have taken as devisees, and not as heirs at law? *Mathews v. Bowman*, 3 Anst. 727. These words are not used, but terms of the same import are. In wills, the expressions, “equally to be divided,” “share and share alike,” “respectively between and amongst them,” have been held to create a tenancy in common: 2 Bla. Com., c. 12, note by Chitty; and in 2 Powell on Devises, c. 18, pp. 370, 371, it is said: “It may be stated generally that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will have this effect.” He also states several examples and references. We are referred to 4 Kent’s Com. 367, as an authority to show that in this country, where primogeniture does not exist, the technical distinction between coparcenary and estates in common may be considered as essentially extinguished. This, however, is not the law in this state; for, as we have seen, these estates have been recognized by the legislature and by the court of appeals.

But the question has been expressly decided in England. At common law it could not arise, except where the ancestor died without male heirs, or where lands descended to all the sons according to the custom. Where a testator seised of lands in fee, being of the nature of gavelkind, devised them to his heirs by the custom, and to their heirs, equally to be divided amongst them, the question was, whether they should be in by descent or devise. Anderson, J., held that without the words "equally to be divided amongst them" they would be joint tenants, and that with these words they were tenants in common, but in either case, that they took as heirs; and the other justices concurred: *Bear's Case*, 1 Leon. 112, 315. This case is quoted as authority in 1 Powell on Devises, 428, and 1 Jarm. on Wills, 68. See also *Packman v. Cole*, 2 Sid. 53, 78, to the same effect. And so in *Anonymous*, Cro. Eliz. 431, a man having two daughters, being his heirs, devised his land to them and their heirs. "The question was, whether they took as joint tenants by the devise, or as coparceners by descent." And all the justices held clearly that they took as joint tenants. If, therefore, the will creates a joint tenancy, or a tenancy in common, the property does not pass to the devisees as heirs at law, but as purchasers under the will.

It is contended that the distinction is merely technical, and does not affect the enjoyment of the estate, whether held in coparcenary or in common, as in Maryland there is very little if any difference between these titles; and we are told that this distinction should not avail against the rule on which the appellants rely to convert this devise into an inheritance. This argument may be applied the other way with as much force. When a will is made, the presumption is that the testator intended that the estate should pass by devise, and not by descent. This design, however, is sometimes frustrated by rules of law, which is sought to be done in the present case by one for which there are not the same reasons under our laws as in England: 1 Powell on Devises, 421. This rule is as technical as the other. However, it exists, and we have no disposition to disregard it, but we think it does not apply in the present case, as the will does not pass the same estate in quality and quantity that the devisees would have taken as heirs at law.

Judgment affirmed.

CHILDREN PRESUMED TO TAKE LAND AS HEIRS until it is shown that the testator's will was executed so as to pass real estate, and that its contents

were inconsistent with his children's claim to the land as heirs: *Stephenson v. Doe*, 46 Am. Dec. 489; and an estate in fee is presumed to descend on the death of the ancestor in pursuance of the laws of inheritance, unless the descent is shown to have been interrupted by a devise: *Baxter v. Bradbury*, 37 Id. 49.

CHILDREN OF PARENTS WHO DIE INTTESTATE TAKE AS COPARCENERS IN MARYLAND: *Hoffar v. Dement*, 46 Am. Dec. 628.

TENANTS IN COMMON, WHEN REGARDED AS COPARCENERS: See *Patterson v. Lanning*, 36 Am. Dec. 154.

PRINCIPAL CASE WAS CITED IN *Power v. Davis*, 3 McArthur, 167, in holding that where a will gave a better title to the devisees than they would acquire by descent, they take by purchase, and not by descent.

SUSQUEHANNA BRIDGE AND BANK CO. v. THE GENERAL INSURANCE CO.

[3 MARYLAND, 305.]

CORPORATION MAY SECURE BY MORTGAGE DEBT DUE BY IT, independently of the fact of its being authorized to deal in mortgages; such power being necessarily incident to the power to borrow, and its exercise can only be restrained by express inhibition in the act of incorporation.

PROOF OF SEAL OF CORPORATION IS UNNECESSARY, when it is affixed by the proper officer or agent of the company.

PERSONS ACTING PUBLICLY AS OFFICERS OF CORPORATION ARE PRESUMED TO BE RIGHTFULLY IN OFFICE; and in the absence of proof on the subject, it is not incumbent on the party claiming under the acts of an officer *de facto* to show that he has been properly elected.

BILL in chancery against the defendant below and appellant, the Susquehanna Bridge and Bank Company, for the sale of certain real estate mortgaged by it to the appellee. The president and directors of the defendant denied the indebtedness and the execution of the mortgage. The mortgage in question purported on its face to be executed under the corporate seal of the company by one Freeman, president. It was shown that Freeman was recognized as the president of the company; that the mortgage was drawn at his request, acknowledged and signed by him as president, and that the seal affixed thereto was in his possession. The admissibility of the mortgage in evidence was excepted to by the defendant, but the sale as prayed for was decreed by the chancellor.

Charles F. Mayer, for the appellant.

S. Teackle Wallis and Thomas G. Pratt, for the appellee.

By Court, LE GRAND, C. J. The decree in this case is unaccompanied by an opinion of the chancellor, and we are therefore not apprised of the reasons which induced him to sign it.

The reversal of the decree is asked on several grounds, none of which, in our judgment, are tenable. It is objected that the appellant had no right to give the mortgage. This objection is answered by the fifteenth section of the act of 1814, chapter 66, which expressly authorizes the corporation to deal in mortgages. But independently of this, we are of the opinion it would have been competent to the corporation to have secured by mortgage a debt due by it; such power is necessarily incident to the power to borrow, and its exercise could only be restrained by express inhibition in the act of incorporation.

It is contended there was no proof of the seal of the corporation. This is unnecessary when it is affixed by the proper officer or agent of the company: *Angel and Ames on Corp.* 195, sec. 7. But it is said there is no proof that Freeman, who professed to be the president, was so in fact. The evidence shows he held himself out to the world as such, and was dealt with accordingly by the community. If he were not in point of fact the president, the corporation owed it to the community to give notice of the fact. To allow a person publicly to proclaim himself authorized to act in a certain capacity, and to seek to avoid his acts when such avoidance would work to the advantage of the corporation, would be but to authorize the perpetration of frauds on an unsuspecting community. It is nowhere denied, in any of the answers, that Freeman was the president at the time of the execution of the mortgage; and it has been held by the court of appeals, in the case of *Burgess v. Pue*, 2 Gill, 287, that persons acting publicly, as officers of a corporation, are presumed to be rightfully in office, and that, in the absence of proof on the subject, it is not incumbent on the party claiming under the acts of an officer *de facto* to show that he has been properly elected.

Decree affirmed.

CORPORATIONS, INCIDENTAL POWERS OF: See *People v. Utica Ins. Co.*, 8 Am. Dec. 243; *N. Y. Firemen Ins. Co. v. Ely*, 13 Id. 100; *The Banks v. Poitiaux*, 15 Id. 706; *McCartee v. Orphan Asylum Soc.*, 18 Id. 516; *Leggett v. N. J. Man. etc. Co.*, 23 Id. 728; *Pres. etc. of Bank of Chillicothe v. Mayor etc. of Chillicothe*, 30 Id. 185, and note; *State v. Mayor etc. of Mobile*, Id. 564; *Commercial Bank v. Newport Man. Co.*, 35 Id. 171; *Burrill v. Pres. etc. of Nahant Bank*, Id. 395; *Ricanna Nav. Co. v. Dawsons*, 46 Id. 183; *Blair v. Perpetual Ins. Co.*, 47 Id. 129.

PROOF OF SEAL OF CORPORATION, WHEN NECESSARY: See *Den v. Vreelandt*, 11 Am. Dec. 551; *Leggett v. N. J. Man. etc. Co.*, 23 Id. 728, and note.

PERSONS ACTING PUBLICLY AS OFFICERS OF CORPORATION PRESUMED RIGHTFULLY IN OFFICE: *Selma & Tenn. R. R. v. Tipton*, 39 Am. Dec. 344.

NEW YORK LIFE INSURANCE COMPANY v. FLACK.

[3 MARYLAND, 341.]

POWER OF ASSIGNMENT OF LIFE INSURANCE POLICY IS NOT LIMITED by a provision to pay the sum secured to the "legal representatives" of the insured, but the provision is designed to apply only in case the latter had died without having previously assigned, where the contract was with the "assured, his executors, administrators, and assigns," and at the bottom of the policy were the words "N. B. If assigned, notice to be given the company."

REASONS REQUIRING UNDERWRITERS' ASSENT TO MAKE ASSIGNMENTS OF FIRE POLICIES VALID DO NOT OBTAIN in case of an insurance on human life.

NOTICE OF ASSIGNMENT OF INSURANCE POLICY IS SUFFICIENTLY EARLY when given two days subsequent to the assignment, although after the death of the assured, if the policy does not specify any particular time within which notice is to be given.

DELIVERY OF ASSIGNMENT OF INSURANCE POLICY IS SUFFICIENT TO VEST TITLE IN ASSIGNEE, and is good against all but the creditors of the assignor, when made by the assignor to the representative of the assignee.

ASSIGNMENTS OF INSURANCE POLICIES ARE AUTHORIZED by the Maryland act of 1829, chapter 51, policies being but choses in action for the payment of money, and all contracts for the payment of money, whether express or implied, being within the purview of that act.

REJECTION OF PROPER INSTRUCTIONS WILL NOT AUTHORIZE REVERSAL OF JUDGMENT, when those given cover the whole ground.

ASSUMPSIT on a policy of insurance. The facts are sufficiently stated in the opinion. Verdict and judgment were given against the company, and it appealed.

William Schley, for the appellant.

William H. Young and Charles H. Pitts, for the appellee.

By Court, LE GRAND, C. J. The action in this case was founded on a policy of insurance, underwritten by the appellant on the twenty-sixth day of October, 1849, being an insurance on the life of Jonathan Nesbitt. On the fifth of June, 1850, he died, after having, on the third of the same month, assigned all interest in the policy to the appellee, "for the sole and separate use of his wife, Mary E. Nesbitt, her executors, administrators, and assigns." Notice of the assignment was not

given to the company until after the death of Nesbitt, but on the day when that event took place.

The right of the plaintiff to recover in this action is denied on several grounds. Two of them relate to the assignment made on the third of June, and the seventh and eighth prayers are designed to present the questions growing out of it. The eighth denies the right of the plaintiff below to recover in his own name by virtue of the assignment; and the seventh asserts that no recovery can be had if the jury should find the company was not notified of the assignment until after the death of Nesbitt. If either of these propositions be true, then whatever else there may be in it, there is not sufficient in the case to give the plaintiff a proper standing in court.

The eighth prayer is founded upon two grounds: 1. That the policy provides the sum of money secured by it shall, in the event of the death of Nesbitt, be paid to his "legal representatives;" and, 2. That it was in violation of the testamentary system of the state.

Although it be true that there is a provision in the policy binding the company to pay the legal representatives of the insured, yet this obligation must be taken in connection with other portions of the same instrument; otherwise the true meaning of the whole would not be ascertained. The contract is with the "assured, his executors, administrators, and assigns;" and at the bottom of the policy are these words: "N. B. If assigned, notice to be given the company."

Taking into consideration the whole instrument, our opinion is that the provision to pay to the legal representatives was designed to apply only to a case where the assured died without having previously assigned the policy, and not to be construed as in any sense limiting the power of the party insured to assign. The *nota bene*, at the close of the policy, was evidently inserted for the protection of the company. Knowledge of the assignment could only be important to it in one view: to prevent the possibility of its being compelled to pay both the assignee and the legal representatives of the insured. In fire policies there is generally a condition that any assignment will be void without the assent of the underwriters be first obtained. The reason of this is obvious. A fire policy may be underwritten for one person when it would not be for another. In all such cases, the character for integrity and caution of the party constitute important considerations. While the character of one person would be a complete guaranty that he would not fire his own

house or goods, the character of his assignee might furnish no such assurance, and therefore it is that in fire policies the assent of the underwriters is indispensable to the validity of the assignment. No such reason obtains in the case of an insurance on human life.

The witness William H. Young, esq., testifies that he prepared the assignment; and although the appellee was not present at the time, he had been previously informed of the intention to execute such an assignment, and that he agreed to act as trustee; that after the execution of the instrument it was delivered to witness, who placed it in a drawer in the house of Nesbitt, which was under the control of witness; that he prepared a notice of the fact of the assignment, to be delivered to the company, and was under the belief it had been delivered, until, on the day of the death of Nesbitt he found such not to be the case, when he immediately caused the notice to be given. We consider this a sufficient compliance with the requirement of the policy. It does not specify any particular time within which the notice is to be given, and we think two days sufficiently early, although after the death of the assured. The witness testifies he considered himself as representing the appellant. There is no pretense of fraud in the assignment, and we consider the delivery to Young a sufficient delivery to vest title in the assignee.

We consider the assignment as authorized by the act of 1829, chapter 51, the policy being but a chose in action for the payment of money. All contracts for the payment of money, whether express or implied, are within the purview of that act: *Crawford v. Brooke*, 4 Gill, 214; *Gordon v. Downey*, 1 Id. 41. The delivery of the assignment to Young, as the representative of the appellee, was a complete and absolute surrender of all legal power and dominion over the policy, and as such was good against all but the creditors of the assignor; and none such are before us, and for aught we can see, there were none: *Pennington v. Gittings*, 2 Gill & J. 208; *Bradley v. Hunt*, 5 Id. 54 [23 Am. Dec. 597]; *Harrison v. McConkey*, 1 Md. Ch. 34. For these reasons, we are of opinion the county court properly rejected the seventh and eighth prayers of the appellant.

The appellant offered, in all, nine prayers to the court below, some of which were granted and some rejected. We have said we concur with them in the propriety of the rejection of the seventh and eighth prayers. All the others were founded on the truthfulness or falsehood of the declaration of the insured

at the time he answered the interrogatories propounded to him by the company, and the evidence, *aliunde* his declaration, touching the condition of his health.

It appears from the evidence in the cause that the deceased had been applied to by the agent of another insurance company, and, at his solicitation, underwent an examination by the physician, who declined reporting favorably on his case, because his pulse was two or three beats higher than his company would take, and who said he could not recommend the life, and suggested that the papers be not sent on to his company (which was located in New Jersey); and that he should not be required to pass an opinion on the life, as it might injure Mr. Nesbitt if he applied to another company. The application had been filled up, and was ready to be sent on, but the opinion of the physician prevented it. All persons applying for insurance by the appellant are required to answer certain questions, and a failure to answer them honestly and correctly deprives them of all advantages derivable from the policy. The fourteenth interrogatory propounded to Nesbitt was in these words: "Has a proposal been made for insuring the life of said party [Nesbitt] at any other office? And if so, state whether it was accepted or declined." To this question Nesbitt answered "No."

On the testimony the appellant, by its second prayer, asked the court—which it refused to do—to instruct the jury, if they should find from the evidence that Nesbitt, prior to the application to the appellant, had filled up an application to another company, with intent to obtain a policy of insurance from said company in case such application should be accepted; and that the applicant was examined by the medical examiner of said company, and that it was the purpose and intention of said Nesbitt to prosecute his application in case he should be recommended by said medical examiner as a person proper to be insured by the company; and shall further find that said Jonathan Nesbitt was rejected on such examination by said Dr. Collins, and the said Nesbitt thereupon withdrew his papers from the agent of the company; and shall further find that on his application to the appellant for insurance he did not disclose the fact that he had been so examined and rejected, and that it was a material fact that ought to have been made known to the appellant—then the appellee was not entitled to recover.

Whether the facts set out in the prayer amounted to a proposal it is not important, in the view we have of the case, to inquire. The prayer rests entirely on the falsehood of the declara-

tion of Nesbitt, and the court, by giving the first and ninth prayers offered by the appellant, clearly put the question before the jury, and gave to the company all the advantage to which it was entitled. The first instruction informed the jury that if they should find "the declaration made by the said Jonathan Nesbitt, bearing date the twentieth day of October, 1849, was in any material respect untrue, then the plaintiff is [was] not entitled to recover in this case." And the ninth prayer told them if they should find from the evidence "that prior to the making of the proposal of the twentieth day of October, 1849, a proposal had been made in August, 1849, by the said Jonathan Nesbitt for the insurance of his life for five thousand dollars, at the Mutual Benefit Insurance Company of New Jersey, then the plaintiff" was not entitled to recover.

These two instructions clearly submitted the truth or falsity of the answer of Nesbitt to the jury. The first distinctly told them, if they should find his declaration in any material respect untrue, the appellant was not entitled to recover; and the ninth as clearly informed them, if they should find he had made a prior proposal to another company, that there could be no recovery. In the case of the *Mutual Safety Insurance Company v. Cohen*, 3 Gill, 482 [43 Am. Dec. 341], the court say: "Some of the instructions which were asked for, and refused, might have been granted; but it is believed that the instruction given covers the whole ground, and therefore, for the rejection of them, the judgment ought not to be reversed." See also *Stokes v. Saltonstall*, 13 Pet. 191. We do not, therefore, deem it necessary to inquire whether the second prayer of the appellant, if it were the only prayer in the case, ought to have been granted. It is clear all the advantage it proposed to the company was secured by the first and ninth prayers, which were granted by the court, and therefore, in the language of the court in *Mutual Safety Insurance Company v. Cohen*, *supra*, for its rejection the judgment ought not to be reversed.

For the same reasons, we are of opinion that the county court ought not to be reversed because of its rejection of the fourth and sixth prayers. It appeared from the evidence that Nesbitt was liable to attacks of dyspepsia, and that he had been attended at different periods by different physicians. The fourth prayer asked the court to instruct the jury, that if they should find that Nesbitt, "at the time of his application, was predisposed to the disease of dyspepsia to such a degree as seriously to affect his health, and to such a degree as to produce bodily

infirmity," then the plaintiff was not entitled to recover. This prayer, as a distinct proposition, we are of opinion ought to have been granted, for we can not see how a person can be sound and healthy who is predisposed to dyspepsia to such a degree as to produce bodily infirmity; but the company had the benefit of this instruction in the first and fifth, which were granted. The latter told the jury, if they should find he "was not in good health at the time of the application," there could be no recovery; and the first said, if his answers were erroneous in any material respect, the action must be defeated. The tenth interrogatory propounded to Nesbitt was in these words: "Is the party subject or predisposed to any disease or bodily infirmity?" If, therefore, he was, in point of fact, predisposed to dyspepsia, and the proof showed it, the first instruction told the jury the plaintiff was not entitled to recover. Whatever may be our views of the force of the testimony, it is not for us to correct the verdict of the jury; that, more properly, was for the court below, by granting a new trial, if they believed the evidence called for a different finding. The foregoing reasons dispose, also, of the sixth prayer.

Judgment affirmed.

ECCLESTON, J., dissented.

ASSIGNMENT OF INSURANCE, WHEN VALID AND WHAT CONSTITUTES—WHEN POSSIBLE IN GENERAL.—A policy of fire or life insurance was not assignable at common law, in such a sense that the assignee thereof might sue in his own name; but the assignee's rights were recognized, or at least came soon to be recognized, to such an extent that he might sue in the name of his assignor: *May on Ins.*, sec. 377; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.), 88; *Palmer v. Merrill*, 6 Cush. 282; S. C., 52 Am. Dec. 782; *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444; and although the assignee was originally allowed to come into equity, and in fact was at first obliged to resort to equity to enforce his demand, it was finally considered that his remedy at law in the name of his assignor was adequate and complete, and the necessity to resort to equity had ceased: *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; and see 3 Pom. Eq. Jur., sec. 1272. Statutes in England and in many of the states now require assignees of things in action to sue at law in their own names, and have thus made their interests legal: Pom. on Rem., sec. 124 et seq.; 3 Pom. Eq. Jur., sec. 1273. It is worthy to note, in this connection, that the first English statutes permitting legal assignments of things in action were confined to policies of insurance: See 30 & 31 Vict., c. 144; 31 & 32 Id., c. 86. Under these statutes assignees of policies of insurance may now sue in their own names: *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542; *Watertown F. Ins. Co.*, 41 Mich. 131; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269; but where the statutes are not adopted, courts of law at the present day require the suit to be brought in the assignor's name: *United States L. Ins. Co. v. Ludwig*, 103 Ill. 305; and see *Pomeroy v. Manhattan Life Ins. Co.*, 40 Id. 398.

In the case of marine policies, a different rule is established by custom and the nature of the policies themselves, and they are accordingly assignable, with a transfer of the cargoes or vessels, so as to give the assignees the right of suing upon them in their own names: May on Ins., sec. 377; 1 Phill. on Ins., sec. 76; and see *Earl v. Shaw*, 1 Johns. Cas. 314; S. C., 1 Am. Dec. 117.

CONSENT OF INSURERS TO ASSIGNMENT.—a. *Where not Expressly Required.*—It has been laid down in general terms, that a policy of fire insurance is a personal contract, and is not assignable without the consent of the insurers; that much depends upon the character of the owner as a man of prudence, integrity, and watchfulness; and that these considerations enter into the contract: May on Ins., sec. 377; *Sadlers' Company v. Badcock*, 2 Atk. 554, 557; *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa, 319; but the case of *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, contains some observations that are well worth noticing in this regard. Mr. Justice Rhodes, after stating that a policy “may be assigned to the assignee of the property, and for this the assent of the insurer is required, whether it be so stipulated in the policy or not,” proceeds: “Another kind of assignment is, when the policy is assigned before the loss occurs, but *without the assignment of an interest in the insured property*. The assignment in this case is of that character. A transaction of that kind is usually called an assignment of the policy, and it is so denominated when the assignment is made after the loss, and it may be convenient to refer to either transaction by those terms. But is it in truth an assignment of the policy? Is it not rather an assignment in the one case of the sum that may become due, and in the other of the sum that has already become due, upon the occurrence of a loss? The contract, as we have seen, being personal, and intended for the indemnity of the insured under certain conditions and provisos, and it being indispensable to a recovery that the insured should hold an insurable interest at the time of the loss, the assignment before the loss can not, by possibility, have the effect to substitute the assignee in the place of the insured, or bring him into any relation with the contract, except to receive the money, if any should become due upon a loss. All the conditions and provisos on the part of the insured are still to be observed by him, and any failure on his part would defeat a recovery on the policy. When both the policy and the subject are assigned with the assent of the insurer, the assignee takes from that time the exact position of the insured. There is no substantial difference between an assignment of the policy alone, executed in the usual form, and an indorsement upon the policy directing the insurer to ‘pay the within, in case of loss, to C. D.’ the assignee. The nature and effect of an assignment of this character was noticed in *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 78, and it was regarded as a transfer of the right to receive the money that might become due upon the happening of a loss. There can be no question that such an assignment is valid between the parties, and that it will be upheld in equity. It is an equitable assignment of a contingent right to the money; and when the loss happens, it becomes, as between the parties, a vested right.” See also *Washington Fire Ins. Co. v. Kelly*, 32 Md. 457, where the purpose of restrictions on assignments of policies, as stated in the principal case, was quoted by Miller, J.; but it was said that these restrictions ought to be made to refer solely to the transfer of the interest in the insured property, for an assignment of the policy simply operated as an equitable assignment of the proceeds in case anything became due

This distinction thus made between an assignment of the policy with a

transfer of the property insured and an assignment without such transfer would seem to be sound. In the case of marine insurance, an assignment of the policy coupled with a transfer of the subject-matter may be made without the consent of the insurers: May on Ins., sec. 377; and see *Earl v. Shaw*, 1 Johns. Cas. 314; S. C., 1 Am. Dec. 117; this distinction resting on the fact that there is less of personal consideration in regard to the risk in marine insurance than in case of fire. The reasons for requiring the insurers' consent to an assignment of a fire policy likewise do not obtain in the case of life insurance: May on Ins., sec. 388; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269, approving the principal case; but see *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625; and it is held that even where the policy contained the words "N. B. If assigned, notice to be given the company," this made no difference, and notice need not be given: *Mutual Protection Ins. Co. v. Hamilton*, *supra*; see also *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 31; *Hutson v. Merrifield*, 51 Ind. 24; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; in all of which it is held that a life policy is assignable like an ordinary chose in action; see also the principal case cited to this effect, in *Emerrick v. Coakley*, 35 Md. 191.

b. *Where Consent is Expressly Required.*—Policies of fire insurance usually contain provisions that if they are assigned without the consent of the insurers they shall be void. Such restrictions have been uniformly held valid: 1 Phill. on Ins., sec. 107; *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 1 Hill (N. Y.), 497; S. C., 3 Id. 508; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76; *Ferree v. Oxford F. & L. Ins. Co.*, 67 Pa. St. 373; *Stolle v. Ætna Fire etc. Ins. Co.*, 10 W. Va. 546; *Waterhouse v. Gloucester Fire Ins. Co.*, 69 Me. 409; but are strictly construed: 1 Phill. on Ins., sec. 207; *Lazarus v. Commonwealth Ins. Co.*, *supra*; and see also *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625, in which it was held that where a policy of life insurance contained a clause that it could be assigned only on written consent of the company, and did not declare that a violation of the provision would work a forfeiture, the assignee could enforce the policy, although the insurer had not consented to the assignment. The clause against the assignment without consent does not, however, prevent the insured from assigning the claim after the loss has occurred: 1 Phill. on Ins., sec. 108; May on Ins. 386; *Britcha v. New York Lafayette Ins. Co.*, 2 Hall, 372; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Courtney v. New York City Ins. Co.*, 28 Barb. 116; *Wilson v. Hill*, 3 Met. 66; *Phillips v. Merrimack Ins. Co.*, 10 Cush. 350; *Walters v. Washington Ins. Co.*, 1 Iowa, 404; *Carter v. Humboldt Ins. Co.*, 12 Id. 287; in such a case the claim is fixed and determined, and the relation of debtor and creditor exists before the assignment. And if the policy provides that if assigned after loss it shall work a forfeiture, such provision is null and void: May on Ins., sec. 386; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598. Where a policy provides that it can be assigned only with the written consent of the company, and is made payable to the assured "or his assigns," the use of the word "assigns" means no more than that the company will pay the amount of the policy to the assured, or to such person or persons as should, with its consent, become the assignee, and consent must be obtained: *Marcus v. St. Louis Mut. L. Ins. Co.*, 7 Hun, 5. The clause in the policy declaring it void if assigned without the underwriter's consent does not apply to a transfer in bankruptcy: *Starkweather v. Cleveland Ins. Co.*, 2 Abb. 67; *Appleton*

Iron Co. v. British America Assurance Co., 46 Wis. 23; nor to a sale and assignment by one partner to his copartners: *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; nor to a case where a mortgage was given on the goods insured, with an agreement to hold the policy for the benefit of the mortgagee: *Prows v. Ohio Valley Ins. Co.*, 2 Cin. Sup. Ct. 14; nor where there was an agreement or understanding that the vendors should hold the policies on the property to be conveyed, for the vendee's benefit in case of loss: *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421; nor does it apply to a deposit by way of pledge: *Ellis v. Kreutzinger*, 27 Mo. 311; and where the assured executed an assignment to be delivered after consent had been obtained, but was not delivered because consent was withheld, the rights of the parties are not thereby affected: *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96. Where an indorsement upon a policy provided that it was not assignable for purposes of collateral security, but that in all such cases it was by indorsement to be made payable in case of loss to the party to be secured, this does not apply to a transfer of the property insured, but only to cases in which the policy alone was to be used as security: *Hoyt v. Hartford Ins. Co.*, 26 Hun, 416. The clause in the policy against assignment without consent can only be taken advantage of by the insurers, and not by a creditor under a subsequent attachment: *Ins. Co. of Penn. v. Trask*, 8 Phila. 32; S. C. on appeal, 71 Pa. St. 31. The condition against assignment of the policy without consent may of course be waived by the insurers or their agents: *May on Ins.*, sec. 384; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343; *Gilliat v. Pawtucket Mut. Ins. Co.*, 8 R. I. 282.

MANNER AND MODES OF ASSIGNMENT.—Policies are usually assigned in writing, but this is not necessary; a verbal assignment accompanied by delivery is sufficient: 1 Phill. on Ins. 80; *Rowles v. Innes*, 11 Mee. & W. 10, *per Parke, B.*; *Pierce v. Fire Ins. Co.*, 50 N. H. 297; *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625; and a verbal assignment of a policy as collateral security is not void under the section of the statute of frauds which provides that the sale of any goods, chattels, or things in action for a certain price or over shall be in writing; such section relates only to absolute sales and transfers of personal property and choses in action: *Bibend v. Liverpool & London F. & L. Ins. Co.*, 30 Cal. 78. It would seem that a delivery of the policy is not always necessary, at least in equity, where it is sufficient if the assignor's intent be shown: See 2 Schouler's Per. Prop. 673, and cases in this note *post*, under the head of "what constitutes an assignment."

An obvious distinction exists between an assignment of a policy of insurance itself and a direction that in case of loss the amount of insurance is to be paid to a designated person: *May on Ins.*, secs. 378, 379; *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush. 337. This distinction is important in determining the rights between assignees and insurers, and finds its most frequent application in the case of mortgages. Mr. May says: "And where the policy is merely made payable in case of loss to the mortgagee, this is no assignment of the policy. Nor does it convert the policy into a contract of insurance with the mortgagee; and he is liable to all the defenses against the policy to which the applicant would be. He is subject to all the conditions of the policy, and takes the risks growing out of the acts or conduct of the insured, even though by the terms of the policy the loss is to be paid to the assignee, as his interest may appear; and the assent of the insurers does not operate to produce a new contract between them and the assignee, but merely to save the policy from forfeiture. The insurers are only bound to pay to the mortgagee what may be found due the insured in case of loss; and if he have a

policy originally invalid, or by his conduct, by alienation or otherwise, has forfeited the right to recover, there is nothing to be paid the mortgagee, even though the assignment be consented to by the insurers:" May on Ins., sec. 379; and see *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 91; *Richmond v. Niagara Fire Ins. Co.*, 15 Hun, 248; *Hall v. Mechanics' Mut. F. Ins. Co.*, 6 Gray, 169; *Loring v. Manufacturers' Ins. Co.*, 8 Id. 28; *Frinck v. Hamden Ins. Co.*, 45 Barb. 384; *Ins. Co. of Penn. v. Trask*, 8 Phila. 32; 71 Pa. St. 31; *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140; *Griswold v. American Central Ins. Co.*, 1 Mo. App. 97; S. C. affirmed on appeal, 70 Mo. 654.

ASSIGNMENT, TO WHOM MAY BE MADE.—The question has frequently arisen whether a policy of insurance may be assigned to any person whatever, or whether it is necessary that the assignee should have an insurable interest. This question is considered in the note to *Morrell v. Trenton Mutual Life and Fire Ins. Co.*, 57 Am. Dec. 92, and the discussion need not be repeated here.

ASSIGNMENT, BY WHOM MAY BE MADE.—Where a policy is taken out by a person for his own benefit, in the absence of any restrictions therein contained, the general rule is that it may be assigned or disposed of by him as he pleases; but under statutes which recognize the right of a husband to insure his life for the benefit of his wife or descendants, the right of a wife to insure her husband's life for her own benefit, or the benefit of her children, and the right of other persons to insure their lives for the benefit of married women, some important questions have arisen.

1. *Assignments by Persons Other than Beneficiaries.*—A policy of life insurance by which the company promised to pay to the assured, his executors, administrators, or assigns, a specified sum for the benefit of his widow and children, can not, under the Mass. Gen. Stat., c. 58, sec. 62, be affected by the will of the assured: *Gould v. Emerson*, 99 Mass. 154, distinguishing *Rison v. Wilkerson*, 3 Sneed, 565, in that the statute of Tennessee only provided that an insurance effected upon a man's life should inure to the benefit of his widow and heirs, and not be subject to his debts, and did not contain the words of the Massachusetts statute, "independently of her husband," or of the "person effecting the same." *Gould v. Emerson*, *supra*, was followed in *Unity Mut. Life Assurance Association v. Dugan*, 118 Mass. 219, where, however, the policy also provided that no assignment thereof should be made, except for the benefit of the wife and children of the assured. In Tennessee it is held that a husband can not assign a policy taken out by himself and made payable to his wife and children: *Scobey v. Waters*, 10 Lea, 551; or to his "legal heirs:" *Gosling v. Caldwell*, 1 Id. 454; S. C., 27 Am. Rep. 774; but see *Rison v. Wilkerson*, 3 Sneed, 565, referred to above, where it was held that the act of 1846, c. 216, sec. 3, did not deprive the husband of the power to assign or otherwise dispose of the policy during his life-time. In Wisconsin, where the statute is much like that of Massachusetts, it is held that a person who procures a policy on his life for another's benefit, and pays the premiums thereon, may dispose of it by will or otherwise to the exclusion of the beneficiary named in the policy: *Clark v. Durand*, 12 Wis. 223; *Kernan v. Howard*, 23 Id. 108; *Foster v. Gile*, 50 Id. 603. Where a husband insured his life for the benefit of his wife and children, "or their legal representatives," and the wife and all the children died before the husband, the last child alone leaving issue, it was held in Kentucky that the husband having paid the annual premiums as they fell due, when the policy was enowled by such payments there was in a modified sense a new contract for the benefit of the beneficiaries then living, that the amount due on the policy was payable to the issue of the last surviving child, and that the husband

had no interest in the policy which he could assign: *Robinson v. Duvall*, 79 Ky. 83. In *Harley v. Heist*, 86 Ind. 196; S. C., 44 Am. Rep. 285, it was held that where a husband insured his life for the benefit of his wife, who died leaving the husband and two children surviving, on the wife's death the policy went to her heirs at law, and that consequently the husband having taken but one third, subject to the wife's debts and costs of administration, could assign only that much, but the assignee was held entitled to be reimbursed for premiums paid by him, with interest; and see also *Pence v. Makepeace*, 65 Ind. 345. Where also a policy was taken by a wife on her husband's life, in favor of and made payable to her children, and after the payment of several premiums she assigned the policy in payment of her husband's debt, and thereupon the assignee paid several premiums, the children, after the husband's death, are entitled only to the value of the policy at the time of the assignment, on the ground that the gift from the mother to them was executed only to that extent: *Landrum v. Knowles*, 22 N. J. Eq. 594. A policy by which a company promised to pay "to A., his assigns," a certain sum on a certain day, "or if he should die before that time, then to make said payment to his legal representatives," and stipulating that if any claim be made under an assignment proof of interest to the extent of the claim would be required, is only assignable as regards the first branch of the contract, and a general assignment carries only such branch and such interest in A.'s life as can be proved: *Armstrong v. Mutual Life Ins. Co.*, 20 Blatchf. 493.

2. *Assignments by Beneficiaries.*—Under the New York law of 1840, c. 80, providing that if the wife survived her husband the amount due on the policy should be payable to her for her own use, free from the claims of her husband's representatives or creditors, and providing for the children in case of her death, policies on a husband's life for the benefit of his wife, and payable to her, her executors, administrators, and assigns, to her sole use, but payable to her children in case of her decease before the husband, in accordance with the provisions of the act, are not assignable by her: *Eulie v. Slimmon*, 26 N. Y. 11; *Barry v. Equitable Life Assur. Soc.*, 59 Id. 587; *Barry v. Brune*, 71 Id. 261; *Wilson v. Lawrence*, Id. 585. The court, in the first of these cases, said: "The act looks to a special provision for a state of widowhood and for orphan children, and it would be a violation of its spirit to hold that a wife could sell or traffic with her policy as though it were real and personal property, or an ordinary security for money." But in *Robinson v. Mutual Ben. L. Ins. Co.*, 16 Blatchf. 195, an assignment by a married woman of a policy obtained by her on her husband's life was held valid, where it was payable to her or assigns, but not to her "sole and separate use." An endowment policy issued to a married woman on her husband's life is also within the act of 1840, as amended in 1866, c. 656: *Brummer v. Cohn*, 86 N. Y. 11; S. C., 62 How. Pr. 171; and this, although the wife indorsed upon the assignment a guaranty of the "validity and sufficiency" thereof: *De Jonge v. Goldsmith*, 14 Jones & S. 131; nor does the assignee acquire any interest in the policy by subsequent payment of the premiums in good faith; his rights are limited to the recovery of the amount paid by him: Id. Before the amendment of 1866, c. 656, however, a wife was not prohibited from assigning an endowment policy on her husband's life, such policy looking primarily not to a state of widowhood or orphanhood, but to a provision for the wife during her husband's life-time, and it is only contingently that it had any relation to the state of her widowhood: *Living v. Donnett*, 26 Hun. 150. A life policy which, as originally issued, was declared to be for the use of the

wife of the insured is not changed in its character by being made a "paid-up" policy; and any transfer of the wife's interest, though made in another state, can not be valid in New York, where the contract is made payable: *Mutual Life Ins. Co. v. Terry*, 62 How. Pr. 325. By the New York laws of 1873, c. 821, a limited power of disposition of a policy for her benefit was allowed a married woman, and now, by the laws of 1879, c. 248, she may assign such policy, with the written consent of her husband, to any person whomsoever. The ruling of the New York courts has not been universally adopted, and the opposite conclusion has been arrived at by the following cases: *Emerick v. Coakley*, 35 Md. 188; *Whitridge v. Barry*, 42 Id. 140, citing the principal case; *Archibald v. Mutual Life Ins. Co.* 38 Wis. 542; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398; *Scobey v. Waters*, 10 Lea, 551; *Collins v. Dawley*, 4 Col. 138; *De Rouge v. Elliott*, 23 N. J. Eq. 486; *Bond v. Mutual Ben. Life Co.*, 9 Phila. 149; *Pence v. Makepeace*, 65 Ind. 345; and in Missouri if the amount of the premium annually paid exceeds three hundred dollars: *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; S. C., 4 Am. Rep. 328; *Baker v. Young*, Id. 453. On the other hand, the courts of Massachusetts hold the same way as those of New York: *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157. In *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, a life policy on a husband, made payable to the wife for her sole use, and in case of her death before his to be paid to her children, was absolutely assigned by the wife, who died before her husband; held that even if she had any assignable interest under the Connecticut statute, that interest was contingent on her surviving her husband, and was gone on her death before his, but the assignee, having paid a premium after the assignment, was equitably entitled to repayment. The court, in commenting upon *Eadie v. Slimmon*, *supra*, which it said was decided under a statute substantially like the Connecticut statute, makes this suggestion: "That such should be the law applicable to a policy the premiums on which were paid by the husband certainly seems reasonable and just; while on the other hand, if the wife paid the premiums from her own separate estate, it is difficult to suggest a reason why she could not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her." A written assignment of an insurance policy on a husband's life, payable to the wife, executed by both husband and wife to secure the payment of money loaned to the wife to pay for her real estate, is void under the law of Indiana, she being incapable, as a married woman, of making a contract of that kind: *Godfrey v. Wilson*, 70 Ind. 50. A wife is entitled to the amount of insurance if she is induced to execute an assignment of the policy through the undue influence of her husband, and without any knowledge of the purpose or purport, independent of the question whether or not the policy was assignable under the statute, as being for her benefit: *Fowler v. Butterly*, 78 N. Y. 68; S. C., 34 Am. Rep. 507. The right to claim that a married woman can not make a valid assignment of a policy for her benefit is personal, and can not be taken advantage of by her creditors: *Smillie v. Quinn*, 25 Hun, 332. Similar decisions have been made to those of New York in cases where, instead of there being statutory provisions, the charters of the insurance companies themselves have contained clauses in all respects like the New York statutes: *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. 155; *Fraternal Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292. It is well to observe that some of the foregoing differences of opinion, under this head, are in some cases due to a difference in the language of the statutes themselves.

WHAT CONSTITUTES ASSIGNMENT.—A mere sale and transfer of the as-
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sured's interest in the subject insured does not operate as an assignment of the policy, as incidental to the subject: 1 Phill. on Ins., sec. 86; May on Ins., sec. 379; *Kitts v. Massasoit Ins. Co.*, 56 Barb. 177; nor does the title to the policy pass by the assignment of a note secured by the insured property: *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308. It has been stated above that a policy of insurance may be assigned by delivery alone, without writing. It is not necessary that delivery should be made to the assignee in person; thus handing the policy to the agent of the insurers, with a request to keep it for the insured's wife, is a good delivery: *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625; so a deed of assignment delivered to trustees is good, without a delivery of the policy: *Fortescue v. Barnett*, 3 Myl. & K. 36; and where a life policy was by writing assigned in trust, but not delivered to the trustee in person, but placed in the safe of a firm of which the assignor was a member, and found there upon his death, it is a good delivery: *In re Trough*, 8 Phila. 214. An assignment of a policy made before loss, but not delivered until afterwards, does not take effect until delivery, and then as an assignment of a money demand against the insurers: *Watertown F. Ins. Co. v. Grover & Baker S. M. Co.*, 41 Mich. 131. An assignment in equity may be exceedingly informal; thus in *Chowne v. Baylis*, 31 Beav. 351, a letter written by the insured, giving notice of a wish to transfer his interest to a third person, the letter being shown to the company, and its contents noted on the books, was held to be a good equitable assignment as against a subsequent assignee of the policies, who had in addition obtained possession of them; and where the holder of a life policy, the money arising from which, by its terms, could be disposed of by will, or if not so disposed of should go to his widow, or to his legal heirs or representatives, being behindhand with his assessments, sent his wife a writing that he made the policy "read for her benefit in case of my death," and also wrote to her that such inclosed note made the policy hers, if she wished to keep it up, it was held that the writings, in connection with the action of the wife in paying the assessments, accomplished an equitable assignment to her: *Swift v. Railway Passenger etc. Benefit Ass.*, 96 Ill. 309. A letter authorizing a person to hold the policy as security for any indebtedness that might exist between the two, is a good assignment in equity: *Jones v. Consolidated Invest. Ins. Co.*, 26 Beav. 256; but if one who has had his life insured writes to his father and sisters that the insurance was made for their benefit, but makes no assignment or delivery of the policy to them, it amounts only to an executory agreement to create a trust in the future, and can not be enforced in equity: *In re Webb*, 49 Cal. 541. If a purchaser agrees to insure for the benefit of his vendor, and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the money payable upon the policy in case of loss, but not of an assignment of the policy: *Cromwell v. Brooklyn F. Ins. Co.*, 39 Barb. 227. Where it was provided that if the policy should be assigned *bona fide* the assignee should have the benefit of it so far as his interest extended, although the insured should commit suicide, a deposit of the policy as security, accompanied by a letter promising to assign it upon request, though there was no notice given to the insurers, is a good equitable assignment, and is within the condition: *Cook v. Black*, 1 Hare, 390. A memorandum in the company's policy register, stating the value of the policy, and that it was transferred to a certain person, was held, in *Griswold v. American Central Ins. Co.*, 1 Mo. App. 97; S. C., 70 Mo. 654, to operate as an assignment of the policy. An assignment can not be made *pro tanto* of an

insurance policy: *Palmer v. Merrill*, 6 Cush. 282; S. C., 52 Am. Dec. 782; but see *Pomeroy v. Mahattan Life Ins. Co.*, 40 Ill. 398. The holder of a fire insurance policy may, however, after a claim against the company has accrued under it, *bona fide* assign an interest in the same to a creditor to the extent of such creditor's debt: *Daniels v. Meinhard*, 53 Ga. 359. An assignment of a policy as collateral security "to first A. and then to B.," A. and B. being holders respectively of first and second mortgages, confers upon them a joint right of action, the proceeds of the suit to be applied to the payment first of A.'s mortgage, and second of B.'s: *Marts v. Cumberland Fire Ins. Co.*, 44 N. J. L. 478. Possession of the policy is but *prima facie* evidence of a right to the proceeds: *Wood v. Phoenix Mut. Life Ins. Co.*, 22 La. Ann. 617; *Pence v. Makepeace*, 65 Ind. 345; and see *Neale v. Molineux*, 2 Car. & Kir. 672.

REJECTION OF PROPER INSTRUCTIONS WILL NOT AUTHORIZE REVERSAL OF JUDGMENT when those given cover the whole ground. The principal case has been cited to this proposition in *Davis v. Furlow's Lessee*, 27 Md. 546; *Philadelphia etc. R. R. v. Harper*, 29 Id. 338; *Smith v. Wood*, 31 Id. 299; *Philadelphia etc. R. R. v. Weaver*, 34 Id. 434; *Kershner v. Kershner's Lessee*, 36 Id. 334; and see *Mutual Safety Ins. Co. v. Cohen*, 43 Am. Dec. 341, and note.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—The principal case was explained in *Cox v. Sprigg*, 6 Md. 286, in considering the necessity of delivery to the validity of an assignment of a "single bill," to the effect that although it does not appear in the printed statement of the case that the policy was delivered at the time of the assignment, the delivery appeared in the record, which the court had examined; it was cited in *Armstrong v. Mutual Life Ins. Co.*, 20 Blatchf. 497, in support of the proposition that there are many cases in which life insurance policies have been held assignable, but that stress is laid upon the form "executors, administrators, and assigns," to the point that in the principal case great weight was laid upon the word "assigns."

SPINDLER v. ATKINSON.

[3 MARYLAND, 409.]

TRUSTEE'S DESIGNS IN PURCHASING AT SHERIFF'S SALE ARE IMMATERIAL, whether it be for himself or for the purpose of quieting his title as trustee; because no matter what his intention might be, the law will protect *cestuis que trust* against the acts of the trustee.

INNOCENT PURCHASER AT SHERIFF'S SALE MAY ACQUIRE GOOD TITLE, notwithstanding such sale is brought about through the fraud of others.

PURCHASER AT SHERIFF'S SALE TAKES ALL THAT GRANTOR OWNED IN PROPERTY at the time of a prior conveyance thereof which is void as to creditors; and if questions subsequently arise as to the *bona fides* of the deed, they must be settled between the purchaser and those claiming under it.

ONE UNDERTAKING TO ACT FOR ANOTHER CAN NOT ACT FOR HIMSELF, as a general rule, in the same matter, but it is not universally true that a trustee can not purchase the trust estate; circumstances may arise to render it necessary to protect the interests of the *cestuis que trust*.

TRUSTEE MAY PURCHASE AT SHERIFF'S SALE PROPERTY HELD IN TRUST under a deed void as to the grantor's creditors, and must be treated as the purchaser of the grantor's entire interest at the date of the deed, in the absence of fraud on his part in connection with such sale.

TRUSTEE CAN NOT HOLD TRUST PROPERTY FOR HIS OWN BENEFIT, BUT IS ENTITLED TO REIMBURSEMENTS for his expenditures and improvements, although he can purchase such property at a sheriff's sale made without his instrumentality.

INTEREST OF CESTUIS QUE TRUST INURES TO BENEFIT OF CREDITORS when purchased at a sheriff's sale by a trustee of a deed of trust void as to creditors.

BILL in chancery by the permanent trustee of William C. Spindler, an insolvent debtor, to set aside certain conveyances of real and personal property, made by the latter to one James Philips, as fraudulent against creditors. The chancellor decreed the conveyances to be null and void as to the creditors; but the appeal was only taken from that part of the decree which annulled the deeds of the real estate. Spindler, on March 27, 1834, conveyed to Philips all his real estate in the city and county of Baltimore, upon an expressed consideration of ten dollars, in trust for his wife for life, then in trust for his children, with a contingent life estate over to himself. It was admitted that Spindler was insolvent at the time of making this deed, and that it was void as to creditors. The bill alleged a confession of judgment in favor of the General Insurance Company of Maryland by Spindler, and a fraudulent arrangement to pay the judgment and all other sums due the company by Spindler, by which an execution was issued and levied on the property embraced in the deed, and the Baltimore county property, appraised at nine thousand nine hundred dollars, sold by the sheriff, and bought in the name of Philips, for two hundred and fifty dollars. It was further alleged that the Baltimore city property was appraised at four thousand dollars and bought in the name of Philips for three thousand eight hundred dollars; and that at the sale Philip's counsel, who was also counsel for Spindler, exhibited the deed of trust and warned all persons from bidding, thereby preventing *bona fide* competition; the reason for such a high bid in the latter case being that one of Spindler's creditors had also made a bid for the property. The answers denied all charges of confederacy and fraud, and alleged that Philips wished to quiet his own right by purchasing whatever interest of Spindler was liable to sale under execution; that he believed he was discharging his duty in producing the deed of trust at the sheriff's sale, and informing the

public of its contents; that he paid, in person, the sheriff the amounts stated in the bill, no part of which had been returned to him. It appeared that Philips was absent from the country at the time the deed of trust and sheriff's deeds were made, but that he had assented to the proceedings on his return; and also that Philips had permitted Mrs. Spindler, who was his daughter, to reside on a portion of the property. The sheriff testified to the sale of the property for the sums set forth in the bill, and to the payment to the counsel for the insurance company of the amount due on the execution, and the payment of the residue to Spindler's counsel. The counsel for the company did not remember that an agreement in relation to Spindler's property had been made. During the proceedings Spindler and Philips both died, the latter devising a portion of the property for certain purposes.

John Nelson, for the appellants.

Dobbin and McMahon, for the appellees.

By Court, TUCK, J. The admissions at the bar, on the part of the appellant's counsel, have left only one of their points for our consideration, to wit, "whether the sale and conveyance made by the sheriff to James Philips invested him with a complete title to the property in controversy," being that mentioned in the deed of the twenty-seventh of March, 1834.

Upon this admission the appellee is entitled to relief as against the *cestuis que trust* in the deed, that instrument being fraudulent and void as against the creditors of the grantor. But it is said that Philips occupied a different attitude after his purchases at the sheriff's sales; that the property, having been seized and sold under judicial process, issued at the instance of the creditors of Spindler, who had a right to sell for the satisfaction of their judgment, Philips had as much right to buy as any other person. This position is met on the part of the appellee by two objections: 1. It is contended that Philips was party to, or if not party to must be affected by, the alleged fraud and collusion, concocted for the purpose of bringing this property into market to be sold to the prejudice of Spindler's other creditors; and, 2. That if he is not affected by this fraudulent arrangement, equity will not allow him to become the purchaser of property which he held in trust for others. Of these in their order.

For most of the time that these transactions were taking place Philips was abroad, and could have had no participation

in them. He gave his sanction, on his return, to what his agent had done; but it does not necessarily follow from this that he was aware of any fraud in the acts of the parties. Nor do we find in the record such proof of fraud and collusion in bringing about the sheriff's sales as to satisfy us that the judgment, execution, and sales were not the act of the insurance company uninfluenced by any solicitations or contrivances of those charged with the fraud.

There are circumstances of suspicion which, as against the other parties, might afford evidence of fraud in bringing about the sheriff's sales; but we can not find the truth of this allegation as against Philips, when he was not in the country at the time, in opposition to the direct and positive denials in the answers, and in the absence of more positive proof on the subject. The sheriff proves that the property was sold in the usual way, and that the purchase money was paid at the time of the sales. Philips states that the purchases were made in good faith, and that the money paid was his own, of which no part has been refunded. If this were not true, a further examination of the sheriff might have traced the residue, after paying the judgment, to the hands of Philips, or his agent or attorney, and thus shown his participation in the fraud. It is difficult to believe that Philips would have made this purchase under the alleged fraudulent arrangement, and not have secured to himself, in some manner, the residue of this large sum, if it had been advanced by him merely in aid of the fraud. His exhibiting the deed at the sale is relied upon as evidence of a fraudulent intent; but we do not think this by any means conclusive, especially if such conduct can be reconciled with another view of the case, not liable to the imputation of fraud. If he intended to maintain the validity of the deed of trust, it was proper that he should give notice of its existence, that purchasers might not afterwards allege that he stood by and permitted them to make an improvident bargain. It is immaterial whether he designed to buy for himself or for the purpose of quieting his title as trustee: *Casey v. Inloes*, 1 Gill, 493 [39 Am. Dec. 658]; because, no matter what his intention might be, the law will protect *cestuis que trust* against the acts of the trustee. It is alleged, also, that though making the purchase for and taking the deeds to himself, he has dealt with the property as trust estate, by allowing the family of Spindler to occupy and enjoy it, which is evidence that he designed to consummate the original fraud. Mrs. Spindler was his daughter; her husband soon

after died, leaving his family in needy circumstances—fit objects of a father's care and protection. But when he made his will he dealt with it as his own, by charging it, to some extent, with his own debts, and devising it ultimately to his right heirs, instead of those of Spindler, who would be entitled under the deed. From these circumstances, we may infer that he did not buy the property for the purpose of carrying out the fraud. It is conceded that any other person might have purchased and taken a good title. Suppose such had been the case, and that the money had been paid to the sheriff, as in this case, and the balance, after satisfying the judgment, paid over to Spindler, the defendant in the judgment, would the creditors have been in any better situation than they were the day on which Philips made the purchase? Surely not. If fraud was suspected, or if Spindler was insolvent, they might have proceeded against this surplus in the sheriff's hands; but could not have gone against the property in the hands of a *bona fide* purchaser. It is immaterial whether there is or is not fraud on the part of others, if the purchaser be innocent. In such a case a good title may be acquired, notwithstanding the fraud; for otherwise no purchaser at a judicial sale would be safe—indeed few, if any, such sales would be made.

His honor the chancellor, in his opinion, does not consider the question of fraud as connected with the sheriff's sales. He treats the deeds as good *inter partes*, which is unquestionably correct, and as having divested Spindler of all interest in the property, except the contingent life estate reserved to him by the deed, and that when Philips purchased at the sheriff's sale he acquired, and could acquire, nothing more than this contingent right, which, by the death of Spindler, no longer existed: *Atkinson v. Phillips*, 1 Md. Ch. 515. If this view of the extent of the rights of creditors against the property of a fraudulent grantor be correct, then, even if there be no fraud in the sheriff's sale, Philips could have no interest in the present controversy. But in this we do not concur. Though such a deed be good as between the parties, it is void as against creditors; and the law, when dealing with the property in behalf of creditors, treats it as if no deed had been made; as to them, it is no deed at all. The purchaser takes all that the grantor owned in the property at the time of the conveyance. If questions subsequently arise as to the *bona fides* of the deed, they must be settled between the purchaser and those claiming under it. The purchaser is substituted by law in the place of the judgment

creditor: *Owen v. Dixon*, 17 Conn. 492; *Scott v. Purcell*, 7 Blackf. 66 [39 Am. Dec. 453]; *Englebert v. Blanjet*, 2 Whart. 240; *Den d. Ridgeway v. Underwood*, 4 Wash. 129; *Foulk v. McFarlane*, 1 Watts & S. 297 [37 Am. Dec. 467]; *Waters v. Duvall*, 11 Gill & J. 45 [33 Am. Dec. 693]; *Waters v. Dashiell*, 1 Md. 470. Assuming, therefore, that the deed of March, 1834, is void as against Spindler's creditors, and that there was no fraud on the part of Philips in connection with the sheriff's sale, he must be treated as the purchaser of Spindler's entire interest in the property at the date of the deed of trust.

As to the second objection taken on the part of the appellee: the question here is not between Philips and those claiming under the deed as *cestuis que trust*, but between Philips and the creditors of the fraudulent grantor. The general rule certainly is, that a person who undertakes to act for another can not, in the same matter, act for himself. But it is not universally true that a trustee can not purchase the trust estate. Circumstances may arise to render it necessary in order to protect the interests of the *cestuis que trust*. Whether he will, after such sale, hold the property for himself or for others, is another question. In the case of *Bell v. Webb*, 2 Gill, 170, the court of appeals said: "One of the questions in this case is, whether a trustee can be permitted to purchase the *cestuis que trust's* property levied upon and sold at a sheriff's sale, without any instrumentality of his. As decisive of this question, we refer to *Callis v. Ridout*, 7 Gill. & J. 1. The trustee thus purchasing will be entitled to reimbursement for his expenditures in the purchase, but he can not deprive the *cestuis que trust* of the benefit arising from the purchase, if there be such benefit:" See also *Mong v. Bell*, 7 Gill, 244.

Upon these authorities, we are of opinion that though Philips could purchase he could not have held the property for his own benefit. He was estopped from denying the validity of the deed of trust, although the creditors of Spindler might assail it; and when vacated at their instance, the interest of the *cestuis que trust* must inure to the benefit of the creditors. Philips will be allowed for his expenditures and improvements, but can not be charged with the rents and profits, as in the case of *Bell v. Webb*, *supra*, because the complainant has waived that part of the relief claimed by his bill. Under these circumstances, however, we think that interest should not be allowed to him. Nor can we notice the personal property mentioned in the proceedings, inasmuch as no appeal was taken in reference thereto. Having

expressed our views and pointed out wherein we differ from the chancellor, a decree will be signed accordingly.

Decree reversed.

The decree of the court passed in this case, after reversing the decree of the chancellor with costs, proceeds as follows: "And this court proceeding to pass such decree in the premises as the court of chancery ought to have passed, it is further adjudged, ordered, and decreed that the property mentioned in the deed of the twenty-seventh of March, 1834, be sold by the appellee, Joshua J. Atkinson, the permanent trustee of William C. Spindler, according to the provisions of the insolvent laws applicable to the city and county of Baltimore. And that he apply the proceeds of such sale under the directions of the court of common pleas, in the first instance to the reimbursement of the advances made by James Philips in the purchase of said property at the sheriff's sales, and of all permanent improvements and all other necessary expenditures made upon the said property by him or his representatives, with interest from date of this decree; and that he distribute the balance of said proceeds of sale among the creditors of said Spindler, according to the provisions of the insolvent laws, and under the direction of the court of common pleas."

TITLE ACQUIRED BY PURCHASER AT SHERIFF'S SALE: See *Smith v. Painter*, 9 Am. Dec. 344; *Friedly v. Scheetz*, 11 Id. 691, and note; *Davis v. Murray*, 12 Id. 661; note to *McGhee v. Ellis*, 14 Id. 131; *Chahoon v. Hollenback*, 16 Id. 587; *Henderson v. Overton*, 24 Id. 492; *Vance's Heirs v. McNairy*, Id. 553; *Murphy v. Higginbottom*, 27 Id. 395; *Polk v. Gallant*, 34 Id. 410; *Foulk v. McFarlane*, 37 Id. 467; *Scott v. Purcell*, 39 Id. 453; *Halley v. Oldham*, 41 Id. 262; *Tower's Appropriation*, 42 Id. 319; *Oviatt v. Brown*, 45 Id. 539; *Snavely v. Wagner*, Id. 640; *Sanborn v. Kittredge*, 50 Id. 58; *Bush v. Bush*, 51 Id. 675; *Doe v. Hall*, 54 Id. 460; and see *Martin v. Martin*, 7 Md. 378, citing the principal case.

PURCHASE, WHETHER CAN BE MADE BY TRUSTEE OF TRUST PROPERTY: See *Scott v. Freeland*, 45 Am. Dec. 310, and prior cases in note; *Pratt v. Thornton*, 48 Id. 492; *Harrison v. McHenry*, 52 Id. 435; and see *Worthy v. Johnson*, Id. 399, and note.

TRUSTEE'S RIGHT TO REIMBURSEMENT FOR IMPROVEMENTS AND EXPENDITURES ON TRUST ESTATE: See *Dilworth v. Sinderling*, 2 Am. Dec. 469; *Green v. Winter*, 7 Id. 475; *McClanahan v. Henderson*, 12 Id. 412; *Myers v. Myers*, 16 Id. 648; *McMeekin v. Edmonds*, 26 Id. 203; *Pratt v. Thornton*, 48 Id. 492. The principal case was referred to in *Cook v. Berlin Woolen Mill Co.*, 56 Wis. 649, as being on the question of what will be allowed a trustee who purchases trust property on rescission of the sale.

THE PRINCIPAL CASE WAS DISTINGUISHED in *McCann v. Taylor*, 10 Md. 430. where relief was granted in favor of *cestuis que trust*, and a sale of the trust

property on execution on behalf of a creditor of the grantor was restrained, in that in the principal case the debt was created prior to the deed, while in the case under consideration it was subsequently incurred.

WARE v. RICHARDSON.

[3 MARYLAND, 505.]

RULE IN SHELLEY'S CASE CONSTRUES WORDS "HEIRS" OR "HEIRS OF BODY" AS WORDS OF LIMITATION, and not of purchase; and these terms are regarded as conclusive evidence of the testator's or grantor's intent to use them in their legal sense and to give them their legal effect, although a real intention to the contrary may be defeated. In all such cases the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance.

WORDS "HEIRS" IS TERM OF PURCHASE, AND NOT OF LIMITATION; and the intention prevails against the strict construction to the contrary, whenever words of explanation are annexed indicating that the testator or grantor meant to use the term in a qualified sense, as a mere *descriptio personarum*, and that they and not the ancestor were to be the points from which the succession was to emanate.

ESTATES WILL NOT COALESCE IN ANCESTOR UNDER RULE IN SHELLEY'S CASE if the estate limited to the ancestor is an equitable or trust estate; and the result would be the same if the estate for life was a legal estate, and that limited to the heirs an equitable estate.

RULE IN SHELLEY'S CASE IS FULLY RECOGNIZED AND ADOPTED IN MARYLAND; and with its qualifications must prevail as a part of the system of real law, whatever may have been its origin or philosophy.

WORDS "LEGAL HEIRS" ARE NOT CONVERTED FROM WORDS OF LIMITATION TO WORDS OF PURCHASE by any expressions in a deed, which, after granting a life estate, provides that "from and immediately after the death of the said E., then to and for the use and benefit of the legal heirs and representatives of the said E., and to and for no other intent and purpose."

DEED WILL BE CONSTRUED AS FEOFFMENT OR AS DEED OF BARGAIN AND SALE, as will most effectually accomplish the grantor's intention, if the case be one where his intention is to prevail against the strict rules of interpretation.

USE WAS MERE CONFIDENCE IN FRIEND, before the statute of uses, that the feoffees to whom the lands were given should permit the feoffor and his heirs, and such other persons as he might designate, to receive the profits of the land.

STATUTE OF USES TRANSFERRED USE INTO POSSESSION by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee.

TRUST IS USE NOT EXECUTED UNDER STATUTE OF USES IN CESTUI QUE USE, but the legal estate is vested in the grantee or trustee.

USE WILL NOT BE PREVENTED FROM BEING EXECUTED IN CESTUI QUE USE by the mere interposition of a trustee to protect and secure a trust estate

in a third person, even though a married woman, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust.

USE IS EXECUTED IN TRUSTEE when the devise or deed is in trust "to collect and pay over" the rents and profits to another.

USE IS EXECUTED IN CESTUI QUE USE when the devise or deed is in trust to permit another to "enjoy" the rents and profits.

GRANTOR'S INTENTION IS TO PREVAIL IN TRUSTS FOR USE OF MARRIED WOMEN, but with the qualification that it must not contravene or defeat the established rules of construction.

LEGAL ESTATE WILL NOT VEST IN TRUSTEE IN CASE OF TRUST FOR USE OF MARRIED WOMAN unless the instrument creating the trust assigns to the trustee the performance of some duty necessary for her enjoyment of the estate.

MEDIUM OF TRUSTEE IS NECESSARY TO INVEST MARRIED WOMAN WITH SOLE AND INDEPENDENT POWERS, since her rights and powers are ordinarily vested in her husband; and where bequests or conveyances are made to a married woman for her separate use, without the nomination of trustees, her husband is considered in equity as trustee for his wife.

SEPARATE ESTATE IN REAL PROPERTY CAN NOT BE ENJOYED BY MARRIED WOMAN unless through the interposition of a trustee, which circumstance of itself would imply the performance of some active duties on his part.

HUSBAND ACQUIRES CONTROL OVER PROPERTY BY EXECUTING USE IN WIFE in general, and this result is assigned as a reason why a different construction should be given to the instrument than in other cases, in order to effectuate the intention of the grantor.

INSTRUMENT WILL BE SO CONSTRUED AS TO VEST LEGAL ESTATE IN TRUSTEES if possible, where an estate is devised or conveyed to trustees for the separate use of a married woman, because such a construction will best effectuate the intention of the donor.

SAME MODE OF CONSTRUCTION IS ADOPTED IN CASES OF DEEDS AS IN DEVISES, where property is given to the use of married women.

CONVEYANCE SHALL OPERATE AT COMMON LAW, unless the intention of the parties appears to the contrary, whenever a conveyance may take effect either at common law or under the statute of uses.

DEED CREATES MERE EQUITABLE LIFE ESTATE IN MARRIED WOMAN, and executes legal estate in her heirs, where it conveys real estate to a trustee in trust that she "may, during her life, have, hold, use, occupy, possess, and enjoy" the same, "and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble, or control" of her husband, or be liable for his debts, "as fully in every respect as if she was sole and unmarried, and from and immediately after her death then to and for the use and benefit of her legal heirs and representatives."

RIGHT TO APPEAL FROM DECREE OR ORDER, UNLESS IT BE FINAL DECREE, or order in the nature of a final decree, was taken away by the Maryland act of 1830, c. 185; and although the right to an immediate appeal is restored by the act of 1841, c. 11, the party may waive this right, and on appeal from the final decree or order may allege error in all previous interlocutory orders passed in the progress of the cause.

ORDER OR DECREE FINALLY SETTTLING ANY DISPUTED RIGHT OR INTEREST IS FINAL DECREE, it would seem, and as such would warrant an appeal.

DECREES FOR SALE OF REAL ESTATE ARE ENUMERATED AMONG THOSE NOT REGARDED AS FINAL, by the Maryland act of 1830; but the act was not intended to embrace a case where the liability of the property sold was the only question to be determined by the court.

DECREE CAN NOT BE TREATED AS SO FAR FINAL AND CONCLUSIVE as to preclude an appeal on a question where such question was reserved for some future decree of the court.

IRREGULARITY, IF SUCH IT BE, IN THAT CREDITOR'S BILL AND BILL FOR DISTRIBUTION HAVE BEEN UNITED in the same proceeding, or one converted into the other, in the court below, by agreement of the parties, can not be taken advantage of on appeal.

ANSWER IS TO BE TAKEN AS TRUE, as it was not put in issue by a replication, where it was agreed that the cause should be submitted on bill and answer.

BILL in equity. The facts are stated in the opinion.

Thomas S. Alexander and T. Yates Walsh, for the appellants.

William H. Norris, for the appellee.

By Court, MASON, J. This case has been argued most elaborately and with distinguished ability. Every suggestion appears to have been made, and every authority invoked calculated to elucidate the intricate questions involved in the present controversy. With the benefit of all this light, we are constrained, nevertheless, to recognize the difficulties which environ the case.

In order to a proper understanding of the case, we deem it important to state somewhat at length the allegations of the bill and the subsequent proceedings thereon.

The appellee, Charles Richardson, filed his bill of complaint in Baltimore county court, as a court of equity, against the appellants, asking for a sale of the real estate of Eliza Richardson, deceased, for the payment of her debts. He claimed to be a creditor in his own right, and also as administrator *de bonis non* of Robert R. Richardson, deceased. The bill alleges that letters testamentary were granted on the estate of the said Robert to the said Eliza Richardson, who, by virtue thereof, possessed herself of the personal estate of her testator, and partially administered the same, but died before she had returned any account of her administration. The complainant thereupon administered upon her estate, and also upon the estate *de bonis non* of Robert Richardson. The bill charges that Mrs. Richardson died largely indebted; and that her personal estate was insufficient to pay her debts, and thereupon prays the sale of her real estate under the direction of the chancery court; and

that the proceeds of sale may be appropriated to the payment of her debts.

The real estate which the complainant seeks to charge with the debts of Mrs. Richardson was derived by the deed of Areannah Kennedy, executed in the year 1802 to Samuel N. Ridgely, which is set out at length in the record. That deed is, in part, in these words: "Witneseth that the said Areannah Kennedy, in consideration of the natural love and affection which she hath and beareth towards Elizabeth Richardson, wife of Robert Richardson, and in consideration of the sum of five shillings, current money, to her in hand paid by the said Samuel N. Ridgely, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, enfeoff, release, convey, and confirm unto the said Samuel N. Ridgely, his heirs and assigns [here the property is described], to have and to hold the same and every part thereof unto the said Samuel N. Ridgely, his heirs and assigns forever, in trust, nevertheless that the said Areannah Kennedy shall and may, during the time of her natural life, have, hold, use, and enjoy the said piece or parcel of ground and premises, and the rents, issues, and profits thereof, and the same convert to her own use and benefit, and from and immediately after her decease, then upon this further trust that the said Elizabeth Richardson shall and may, during her life, have, hold, use, occupy, possess, and enjoy the said piece or parcel of ground and premises, and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble, or control of her present or any future husband, or being in any manner liable or subject to the payment of his debts, as fully in every respect as if she was sole and unmarried, and from and immediately after the death of the said Elizabeth, then to and for the use and benefit of the legal heirs and representatives of the said Elizabeth, and to and for no other intent and purpose."

The defendants in their answer insist that under the terms of the foregoing deed the said Eliza had but a life estate in the premises thereby conveyed, and that on her death the fee devolved upon her children and heirs, namely, the complainant and his deceased brother. The first question, therefore, which is presented by the present record is, whether Elizabeth Rich-

ardson had a fee or a life estate in the realty embraced in the deed from Areanah Kennedy.

In determining this question, we must first consider whether the rule established in *Shelley's Case*, 1 Co. 88, applies to the deed which we are now called on to construe.

No question connected with the law has elicited more learning and discussion than that which relates to the nature and operation of this rule, as a principle of law for the interpretation of wills and deeds; and none occupies a more prominent place in the history of the law of real property.

The controversies on this subject from the earliest periods down to the present day have been vehement, protracted, and even bitter, eliciting the profoundest logic, severest criticism, and deepest and most laborious research. In one instance, even, this controversy resulted in the dismemberment of the court of king's bench, and at another time this renowned discussion, says Chancellor Kent, became so vehement and protracted as to rouse the scepter of the haughty Elizabeth. The great case, for example, of *Perrin v. Blake*, 4 Burr. 2579, which excited the most noble and illustrious talents of the age in its discussion through every department of Westminster Hall, originated in the island of Jamaica, as far back as the year 1746. After the case had traveled through the courts of that island, it passed the Atlantic on appeal to the king in council. The final termination (the result at last of compromise) of this protracted litigation was in 1777, after an exhausting controversy of upwards of thirty years. When Lord Mansfield delivered his opinion in *Perrin v. Blake*, he used certain sarcastic expressions which gave offense to his associate Mr. Justice Yates, who immediately thereupon resigned his seat as a judge of king's bench, and was transferred to the common bench. Though volumes have been written upon the subject, and more than a century expended in its investigation, still it to this day remains a fruitful subject of strife and discussion, as the present case abundantly illustrates.

In *Shelley's Case*, 1 Co. 104, the rule was laid down, on the authority of a number of cases from the year-books, to be "that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase." Chancellor Kent, however, adopts the following definition of the rule by Mr. Preston, as being more full

and accurate: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate:" 1 Preston on Estates, 263.

In cases, therefore, where the words "heirs" or "heirs of the body" are used, they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor arising from the estate being conveyed, in the first instance, for life, will be permitted to control their operation as words of limitation. In all such cases the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance. By force of the unbending construction given to these terms, it is imputed to the grantor or testator, in legal contemplation, an intention to use the terms in their legal sense and to give them their legal effect, though it should defeat even a real intention to the contrary. In other words, they are regarded as conclusive evidence of the intent of the testator.

There are, however, well-recognized exceptions to this rule, two of which we will advert to at present in general terms. In the first place, whenever the testator or grantor annexes words of explanation to the word "heirs," indicating that he meant to use the term in a qualified sense, as a mere *descriptio personarum*, or particular designation of certain individuals, and that they and not the ancestor were to be the points or termini from which the succession to the estate was to emanate or take its start, then in all such cases where the word "heir" is thus explained or restricted, it is to be treated as a term of purchase and not of limitation. For example, the expressions "heirs now living," "children," "issue," etc., are words of limitation or purchase, as will best accord with the manifest intention of him who employs them. Under this qualification of the rule, the intention prevails against the strict construction.

The second exception to which we will advert is, that where the estate limited to the ancestor is an equitable or trust estate, the two estates, under the rule in *Shelley's Case*, will not coalesce in the ancestor; and the result would be the same if the estate for life was a legal estate, and that limited to

the heirs an equitable estate: *Horne v. Lyeth*, 4 Har. & J. 432.

Whatever may have been the origin or philosophy of this rule, whether it was introduced to secure to the lord of the fee the fruits and incidents of wardship and marriage which he had a right to claim from the heir; or whether the more reasonable idea of Mr. Justice Blackstone be correct, that the rule had its origin in the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by giving the power to the ancestor of immediate disposition of the estate to the exclusion of the heirs, the rule with its qualifications must nevertheless prevail as a part of our system of real law, because it has been fully recognized and adopted as the settled law of Maryland. The court, in *Horne v. Lyeth*, *supra*, say: "To disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequences."

The rule applies clearly to the deed we are now considering, unless it can be shown that it falls within one or the other of the enumerated exceptions. Did, then, Mrs. Kennedy use any apt words in the deed to indicate that the heirs of Mrs. Richardson, and not she herself, were to be the termini from which the succession was to commence, and thereby create in Mrs. Richardson a mere life estate? In other words, are there any expressions in the deed sufficient to convert the words "legal heirs" from words of limitation into words of purchase? There are none, in our opinion, capable of restricting the terms to particular individuals, instead of the entire legal representatives of Mrs. Richardson as a class. On the contrary, the language employed is of the most general character, and is indeed as full and as comprehensive as that employed in *Shelley's Case* itself, and we can not suppose that it will be seriously contended that the present deed, if it were a conveyance directly to Mrs. Richardson herself, without the interposition of the trustee, and she was a *feme sole*, would not be embraced within the operation of the rule.

But in the second place, it is contended that under the peculiar provisions of the present deed an estate of a different nature has been created in Mrs. Richardson from that con-

ferred upon her heirs, and that therefore the two will not incorporate in Mrs. Richardson, thus bringing the case within the operation of the second exception to the rule.

To avoid such a conclusion, it is argued by the appellee on the one hand that the present instrument is a deed of bargain and sale, and that as such the use was executed in Ridgely, the trustee, and that the limitations to use are mere trusts in equity, and that both Mrs. Richardson and her heirs are *cestuis que trust* seised only of an equitable estate, and that as such they will coalesce in Mrs. Richardson under the rule. On the other hand, it is contended that the intention of the grantor should prevail, and that the present deed should be treated as a feoffment to accomplish that purpose. If regarded as a feoffment, it is said that the legal estate would be executed in the heirs of Mrs. Richardson, but that she herself would take but a mere equitable life estate.

Whether the present deed, as an abstract question, be a feoffment or a bargain and sale, is one more difficult than important for us to decide. If it be a case where the intention of the grantor is to prevail against the strict rules of interpretation, then this court will construe the deed as a feoffment or a bargain and sale, as will most effectually accomplish that intention.

In this connection, it becomes necessary to inquire when the legal estate vests in the trustee, and thereby becomes a trust estate, or when it vests in the *cestui que use*, under the statute of uses.

A use is, where the legal estate of lands was in a certain person, and a trust was also reposed in him that some other person should take and enjoy the rents and profits. In other words, a use was a mere confidence in a friend (before the statute of uses), that the feoffees to whom the lands were given should permit the feoffor and his heirs, and such other person as he might designate, to receive the profits of the land: Gilbert on Uses, 1.

The whole system of uses, however, was abolished or remodelled by the statute of 27 Hen. VIII., c. 10, commonly known as the statute of uses. By the provisions of that statute, the use was transferred into possession by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee. The strict construction which was given to this statute by the judges of its time, and the inconvenience and injustice which thereby followed, led, after a lapse of time, through the interposition of a court

of chancery, and the ingenuity and learning of lawyers, to the establishment of a regular and enlightened system of trusts. In this way uses were partially revived under the name of trusts. In regard to this revival of the equity jurisdiction in respect to trusts, Lord Mansfield has said, in *Burgess v. Wheate*, 1 W. Black. 123, "that it has not only remedied the mischiefs of uses so much complained of, but has given occasion to raise up a system of equity, noble, rational, and uniform, in place of a system at once unjust and inconvenient. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid."

A trust, therefore, is a use not executed under the statute of Henry VIII., in the *cestui que use*, but the legal estate is vested in the grantee or trustee.

It becomes, however, frequently a matter of difficult solution to determine when the estate is vested under the statute in the *cestui que use*, or when as a trust it vests in the trustee; and the present case is one by no means free from difficulty on this point.

The inquiry here is, In whom did the legal estate vest under the present deed? It is to be observed that such a trust as is here contended for might readily have been created by express terms: as for instance, if the property had been conveyed to Ridgely and his heirs, to the use or unto the use of him and his heirs in trust for Mrs. Richardson, it would have been a complete disposition of the whole legal estate to the trustee: 2 Crabb's Law of Real Prop. 508. In such a case the use and possession which constitute the legal estate are both vested in the trustee, while the rents and profits would belong to the *cestui que use*. But the supposed case is not this case. If there is a trust in Mrs. Richardson, it is not created by express, technical terms, but it results from the intention of the grantor to do so, as manifested upon the face of the deed, an intention so clear as not to be defeated or controlled by the strict rules of interpretation. It is clear that the mere interposition of a trustee to protect and secure a trust estate in a third person, even though a married woman, will not prevent the use from being executed in the *cestui que use*, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust. And a distinction has been taken between a devise or deed to a person in trust to collect and pay over the rents and profits to another, and a devise in trust to

permit another to enjoy the rents and profits. In the first, the use is executed in the trustee; in the second, in the *cestui que use*. It would follow, then, was Mrs. Richardson not a married woman, or was not the estate by the terms of the deed limited to her sole and separate use, independent of her husband, that this would be a conveyance under the statute, and would vest the legal estate in her notwithstanding her coverture, or the provision that she was to have but a life estate. But in the present case the deed provides that the property shall be held in trust "for her own proper use and benefit, notwithstanding her coverture," etc., and "as if she was sole and unmarried." As has already been intimated, in all cases where a deed or will involves an object or purpose which can not be carried into operation without the active agency of the trustee, such as the collecting and paying over of the rents and profits of land to a married woman for her sole and separate use, the execution of conveyances, etc., then it becomes a special trust, and not a use executed in her; and the question in this case is, Does the deed impose such active duties upon the trustee as will render it necessary for him to have the legal estate to discharge those duties, or is he a mere nominal, inactive agent, who is embraced within the statute of uses?

Most of the elementary writers broadly assert that where the trustee is to hold in trust for the sole and separate use of a married woman, it is a trust, and not a use executed under the statute: 1 Cruise Dig. 456; 2 Crabb's Law of Real Prop. 509; Clancy on H. & W. 256. It is, however, to be regretted, for the sake of the simplification of this question, that the adjudications cited by the books do not with unanimity sustain the proposition to the length to which it is stated. Most of the cases cited by the text-writers will be found to relate to deeds or wills which impose upon the trustee some active functions, such as collecting and paying over of rents, etc., and while, therefore, they do not contradict the proposition, they, notwithstanding, do not sustain it as it is broadly announced: *Nevil v. Saunders*, 1 Vern. 415; *Jones v. Say and Seal*, 1 Eq. Cas. Abr. 383; 8 Vin. Abr. 262; Lord Chief Justice Holt, in *South v. Alleine*, 1 Salk. 228; *Griffith v. Smith*, Moore, 753; *Bush v. Allen*, 5 Mod. 63; and a number of other cases to the same purpose might be cited.

The intention of the grantor is to prevail in cases like the present, but with this qualification, that it must not contravene or defeat the established rules of construction, or in other words,

the intention is to be ascertained by the legal rules of interpretation. Unless, therefore, this deed, in accordance with one of those rules, assigns to the trustee the performance of some duty necessary for the enjoyment of the estate by the *feme covert*, the legal estate would not vest in the trustee. It would seem to follow as a necessary consequence, from the very nature of the present transaction, that a deed to a trustee for the sole and separate use of a married woman would imply that the trustee's aid was invoked and his active services required to support the independent character of the wife. The rights and powers of married women are ordinarily merged in those of their husbands, and whenever it becomes important to invest her with sole and independent powers, it becomes necessary that that character should be exercised through the medium of a trustee. It is now settled, that where bequests or conveyances are made to married women for their separate use, without the nomination of trustees, the husbands, in equity, will be considered as trustees for their wives, and will be required to comply with the intention of the donor: Clancy on H. & W. 257. A separate estate in real property could not be enjoyed by a married woman, unless through the interposition of a trustee, which circumstance of itself would imply the performance of some active duties on his part. Not so, however, with persons not laboring under the same disabilities with married women. In such cases no intervening agent is necessary to enable them to enjoy the property, and therefore the legal estate is vested in them when it would not be in a *feme covert*. Thus, in the case of *Broughton v. Langley*, 2 Ld. Raym. 873, where lands were devised to trustees and their heirs, to the intent to permit A. to receive the rents for his life, etc., it was determined that this would have been a plain trust at common law, and as such executed by the statute. And so it would have been, even if the *cestui que trust* were a married woman; provided the estate was not limited to her sole and separate use.

It is true that there are some cases which have carried this doctrine so far as to embrace within its operation deeds and wills conveying property to married women for their separate use, and have declared the estate to be executed under the statute in the *feme covert*. The only cases brought to our notice favoring this doctrine are *Williams v. Waters*, 14 Mee. & W. 166; *Douglas v. Congreve*, 1 Beav. 59; and *South v. Alleine*, 1 Salk. 258. In the first of those cases, *Williams v. Waters*, it would seem that a different interpretation would have been given to the instrument

by a court of chancery, from a remark made by Rolfe, B., in his opinion. He observed: "It is said we are to construe the deed otherwise, because so the intention of the parties will be effected; but so it may in other ways; it will now, by the interposition of a court of equity." And Baron Parke says: "We can not collect clearly from the words of the deed that they intended to give the trustees an active trust, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife." Thus this case sanctions the principle that where an active trust is imposed upon the trustee he takes the legal estate. The case of *Douglas v. Congreve* is, in important particulars, dissimilar from the case now before us. There the devise was to the wife for her life, for her independent use and benefit, followed by a direct devise after her death to her husband, for his natural life, with remainder to the use of the heirs of her body, etc. The court decided that the strict rules of construction were to prevail, because an intention to the contrary was not sufficiently manifest on the face of the will. The case of *South v. Alleine*, it must be admitted, directly supports the views of the appellee's counsel. But the authority of that case is greatly weakened, if not entirely overthrown, by the fact that Holt, C. J., dissented from the opinion of Rokesby and Eyre, JJ., and that the opinion of the chief justice has been repeatedly sustained by subsequent decisions of the highest authority.

The position assumed by the counsel for the appellee, that it does not necessarily follow by vesting the legal estate in the wife that thereby you establish the marital rights of the husband in opposition to the contrary intention of the grantor, we think is not sustained by the authorities. In most of the cases it is conceded that by executing the use in the wife, the husband acquires control over the property, and that very result is assigned as a reason why a different construction should be given to the instrument in order to effectuate the intention of the grantor. In the case of *Bush v. Allen*, 5 Mod. 63, Justice Rokesby, in reply to the argument that the legal estate vested in the wife, remarked: "But then the husband shall intermeddle when the deviser intended to exclude him." And in the great case upon this subject, *Harton v. Harton*, 7 T. R. 652, Lord Kenyon said "that whether this were a use executed in the trustees or not, must depend upon the intention of the deviser. This provision was made to secure to a *feme covert* a separate allowance, to effectuate which it was essentially necessary that

the trustees should take the estate with the use executed, for otherwise the husband would be entitled to receive the profits, and so defeat the object of the deviser." And also in the case of *Williams v. Waters*, 14 Mee. & W. 166, Parke, B., concedes that the husband could not be excluded if the legal estate vested in the wife.

In the consideration of this case it would be difficult for us to refer to the numerous cases which relate to the subject, much more to attempt to reconcile them with each other. That there is some conflict of opinion upon the subject can not be denied. The later and more modern decisions, however, seem to favor a more liberal construction of deeds and wills in order to reach the real intention of their makers, and therefore in all cases where an estate is devised or conveyed to trustees for the separate use for a married woman and her heirs, this court will if possible so construe the instrument as to vest the legal estate in the trustees, because such a construction will best effectuate the intention of the donor. We think this conclusion would follow from the general principles which we have endeavored to maintain in this opinion, and is warranted by a current of decisions of the highest weight and authority. The case of *Harton v. Harton*, 7 T. R. 652, fully sustains our views, and no higher authority can be invoked on any subject than that of Lord Kenyon. Clancy on Husband and Wife, 256, broadly maintains the very proposition for which we are contending. He says: "Where lands are devised in trust, as to the rents and profits, for the sole and separate use of a married woman, it is immaterial whether the trust be declared to be 'to pay the rents and profits to her' or 'to permit her to receive the rents and profits,' as in either case it would be held that the use was not executed." In addition to the cases we have already cited, we refer to *Hawkins v. Luscombe*, 2 Swans. 391; *Ayer v. Ayer*, 16 Pick. 327; *Franciscus v. Reigart*, 4 Watts, 109; *The Escheator of St. Philip's and St. Michael's v. Smith*, 4 McCord, 452. The cases in *Pickering* and *McCord* are in all respects like the case we are now considering, and fully sustain the conclusions to which we have come. In both those cases the question grew out of a deed, and very similar to the one now before us. In each, the only duty imposed upon the trustee was to hold the estate for the sole and separate use of the wife, and it was held in both cases that, because a separate provision was intended to be made for the wife, it was sufficient to prevent the execution of the estate in her. In the case of *Ayer v. Ayer* the court has gone quite at

length into the subject, and reviewed many of the leading cases relating to it.

It has been urged that more strictness is required in construing deeds than wills, and that as this is a deed, the technical rules of construction should apply with unbending force. To this proposition we do not assent. Cruise, vol. 1, p. 459, says that the same mode of construction is adopted in cases of deeds as in cases of devises, in questions like the present; and the same rule is recognized in *Ayer v. Ayer*, 16 Pick. 330.

The case of *Matthews v. Ward*, 10 Gill & J. 443, has been pressed upon us as a controlling authority in support of the proposition that the present deed should be treated as a deed of bargain and sale. In this respect we do not concur with the appellee's counsel. That case has no especial bearing upon the one we are now considering, except it be to establish the general proposition that deeds of bargain and sale have nearly superseded all other modes of conveyance for passing real estate in Maryland, and the other more important and pertinent principle to the present controversy, that our courts, in construing deeds, will effectuate, as far as possible, the intention of the grantor. Archer, J., who delivered the opinion in *Matthews v. Ward*, admits expressly that the deed in that case might be construed to be a feoffment, if the intention of the grantor would warrant such a construction, and it is declared to be a deed of bargain and sale, because such a view comports with what was supposed to be the intention of the grantor. Whenever a conveyance may take effect, either at common law or under the statute of uses, it shall operate at the common law, unless the intention of the parties appears to the contrary: 2 Saund. on Uses and Trusts, 50.

We are of opinion, therefore, that the present deed creates but a mere equitable life estate in Mrs. Richardson; and that it executes the legal estate in her heirs.

The next question which we are called upon to consider, no less important than the first, is the nature and effect of the decree passed on the twenty-sixth of May, 1847, by Baltimore county court, upon the bill and answer.

A further statement of the facts of the case here becomes necessary. The answer of the defendants to the bill of complaint admits all the preliminary facts stated in the bill as to the death of the parties, the granting of letters testamentary and of administration, etc. The answer then proceeds to admit that the complainant has filed two accounts as stated in the bill and

that it appears that the estate of Eliza is indebted to the estate of Robert, her husband, in the sum of four hundred and ninety-six dollars and ninety-two cents; but that having no knowledge of the debt of three hundred and forty-five dollars, alleged to be due the complainant, the defendants neither admit nor deny the same. The answer denied the liability of the real estate to be sold for Mrs. Richardson's debts. The answer concludes by stating that the real estate is not susceptible of division, and assents to its being sold under a decree, and that the proceeds should be brought into court to be distributed according to the respective titles of the parties. Upon the filing of this answer, it was agreed between the parties that the cause should be submitted upon bill and answer without argument. Thereupon, on the twenty-sixth of May, 1847, a decree was regularly passed ordering a sale of the property by trustees, and that the money should be brought into court to be distributed under its direction. In due course the property was sold, and the sale reported for ratification, and by agreement of the parties was accordingly ratified on the twelfth of October, 1847. Subsequently the auditor stated an account distributing the proceeds of the property among the creditors of Mrs. Richardson. To this account the defendant filed exceptions on the thirtieth of March, 1848, based mainly on the ground that the property was not liable for Mrs. Richardson's debts, and that the item in the account for the two negro women was improperly allowed the complainant. These exceptions were overruled and the auditor's account finally ratified. From the order overruling the exceptions and ratifying the account the present appeal was taken.

From what we have already said, it will be seen that unless the appellants are precluded by the decree of May, 1847, from presenting the question of title upon the present appeal, the real estate in dispute is not liable to be sold for the payment of Mrs. Richardson's debts. We are then to consider whether that decree was in the nature of a final decree, or whether it was, under the circumstances of this case, in the nature of an interlocutory or conditional order.

The act of 1830, c. 185, deprived the party aggrieved of his right to an appeal from any decree or order, unless it be a final decree, or order in the nature of a final decree; and although the right to an immediate appeal is restored by the act of 1841, c. 11, it has been adjudged that the party is at liberty to waive this right, and, on an appeal from the final decree or order, may allege error in all previous interlocutory orders passed in

the progress of the cause: *Dugan v. Gittings*, 3 Gill, 138 [43 Am. Dec. 306]. If this decree be therefore not a final decree, it is subject to review on the present appeal, unless the right has been lost by some act of the party. In some cases it becomes a very difficult question to determine what is or what is not a final decree. It would seem that an order or decree finally settling any disputed right or interest of the parties would be a final decree, and as such would warrant an appeal: *Hagthorp v. Hook*, 1 Gill & J. 309. The act of 1830, it is true, expressly enumerates among the decrees which are not to be regarded as final those for the sale of real estate, but it can not be supposed that that act intended to embrace a case where the liability of the property to be sold was the very question to be determined by the court; and were it not for the peculiar circumstances of this case, it would hardly be seriously contended that if the issue had been made upon the question of title and decided upon that question, the decree would not have been final upon that point as to all parties. The cases cited by the appellants' counsel do not determine a decree like the present to be a mere interlocutory order, and the language of Judge Martin, in *Dugan v. Gittings*, *supra*, is but a mere repetition of that of the act of 1830, and determines nothing in the present case.

If the present controversy related to the rights of the purchaser under the decree in question, there could be no doubt it would be regarded as a decree sufficient to pass to him a good title against the parties to the proceedings. But the present case does not seek to affect the title under this decree. It is a controversy among the parties claiming the proceeds of the sale, and not the property itself. It would seem that it was the intention of the parties to these proceedings to reserve or postpone the settlement of their respective claims to the property until the proceeds of sale were brought into court to be distributed under its direction; and we think that it is equally clear that the court was but carrying out that intentions or *quasi* agreement, when it passed the decree for the sale in the first instance. The court pass the decree for the sale without comment or opinion; but when called upon to settle the rights of the parties to the fund arising from the sale, the same judge who passed the first decree files his opinion at length, thereby clearly showing that, for the first time, he regards the question of title as presented to his consideration.

We fully concur with the learned counsel for the appellee, that decrees and judgments should not be dealt lightly with, or

easily disturbed when rights have been settled by them. But we do not regard this case as coming under this general rule. The parties to these proceedings can not be prejudiced by the views we have expressed. If the appellants' view be correct, the final adjudication of the case is only postponed for the action of the court upon the auditor's account, where both parties have an opportunity fully to be heard. If, on the other hand, that final adjudication is to be taken as having been made, as is contended by the appellee, when the sale was ordered, it will be readily seen that one of the parties, at least, has had his rights passed upon without an opportunity, through mistake, of being heard.

It is by no means an uncommon practice for courts of equity to pass decrees reserving the equities of the parties for some future decree of the court. And although this was not done in the present instance in express terms, yet we have no difficulty in coming to the conclusion that such was the design of both the court and the parties when the decree for the sale was passed. Under such circumstances, this court could not treat that decree as so far final and conclusive upon the parties as to preclude upon the present appeal the consideration of the question of title. We consider one of the very conditions upon which that decree was assented to was that the question of title should be postponed till the fund arising from the sale was to be distributed. Such an arrangement seems to have been the result of a family understanding, for the settlement of this estate, and if, in carrying out that arrangement, one or the other of the parties has gained a technical legal advantage which was not anticipated or provided for, this court will, if possible, defeat such result and effectuate the intention of the parties. This would have been a totally different case if this decree had been the result of a litigious instead of an amicable proceeding, prosecuted according to the strict rules of pleading and evidence. The parties would then have been held strictly to all the legal consequences of such a decree, and so they will now, so far as the rights of third parties not privy to the agreement may be affected by the present decree.

These principles, we think, are sustained by the case of *Glenn v. Hebb*, 12 Gill & J. 271. In that instance, by the agreement of the parties, the case was to be submitted to the chancellor on bill, answer, and general replication, to determine whether there should be a decree to account. In fact, no replication was filed. Were the parties held strictly to the consequence of a

submission on bill and answer alone, as under other circumstances they would have been? No. Judge Archer, who delivered the court's opinion, says: "We must, as we apprehend, however, consider the case as if a replication had been in fact filed, for the agreement indicates that the case was to be heard by the chancellor upon bill, answer, and replication. Such was the clear understanding of the parties, and we can not, without injustice, consider the answer as not replied to."

We mention this case to show that under certain circumstances this court will modify the rigid rules of practice, and temper the harsh consequences of decrees to promote the ends of justice and effectuate the intention of parties.

It has been argued that the supposed agreement upon which the decree was based has virtually converted a proceeding under a creditor's bill into one for a sale for distribution, and that a court of chancery has no such power to convert the one proceeding into the other, nor to blend the two together; that therefore the attempt to do so is irregular and void. We do not deem it necessary to say whether this has been done or not in this case. But if admitted, the question before us is not whether a creditor's bill and a bill for distribution among heirs can be united in the same proceeding, or whether the one can be converted into the other; but the question is, whether, after either has been done in the court below by the assent and agreement of the parties, advantage can be taken of the irregularity, if such it be, in this court upon appeal. We think it can not be.

The bill on its face is a creditor's bill. It sets forth such facts as, if admitted or proved, would have entitled the complainant to a decree. The answer denied several important allegations, and fails to admit others. In conclusion, the answer states that they, the respondents, believe that the property is not susceptible of equal division, and agree that it should be sold by decree, and the proceeds brought into court, to be distributed according to the respective rights of the parties. No replication was put in, and no proof offered. It was then agreed that the cause should "be submitted on bill and answer, without argument, for decree." Thus the answer is to be taken as true, as it was not put in issue by a replication. It is therefore manifest that no decree could be passed except upon the agreement in the answer, consenting to a sale; and in assenting to the decree the complainant took it upon the conditions annexed to it by the defendants, namely, that it should be a decree for a sale, reserving for adjustment and decision the distri-

bution of the proceeds until they should be brought into court, and then "to abide the decision of the court as to a distribution thereof (in like manner as if said property remained unsold), upon the respective titles of the parties claiming an interest therein." Thus it is perfectly manifest, as has already been observed, the parties intended the decree to conclude no rights, further than to effect a sale of the property, and to pass the title out of themselves, and that afterwards the proceeds should be brought into court, to be distributed according to the rules of equity. The decree, accordingly, simply directs a sale, and the proceeds to be brought into court. It does not, in accordance with the usual form under a creditor's bill, direct the land, or so much thereof as may be necessary, to be sold for the payment of the debts of the deceased.

When the proceeds are brought into court, and the auditor states an account allowing the claims of the creditors, exceptions are filed and argued, and the court decide upon them precisely as if the rights of all parties to the fund were reserved for adjudication at that time, and not as though the decree had conclusively established the claim of the complainant and the liability of the property, as is now contended. We consider the agreement assenting to the decree upon the terms mentioned as dispensing with the proof necessary to support the bill of the creditor, and as authorizing a sale under that bill, but expressly reserving the equities of the parties. It is not a case of consent giving jurisdiction. The bill states facts which give jurisdiction, and the agreement but dispenses with proof and matter of form, and submits to such a decree as was clearly within the power of the court to pass without an agreement upon proper averments and proof. There can be no doubt but that the agreement can have the effect to suspend or take away that conclusive character, which in ordinary cases would attach to the decree. It is simply taking a decree upon terms proposed by the defendants and accepted by the complainant; and can it be seriously contended that a court of equity will not give efficacy to those terms?

The questions arising upon the present appeal are as anomalous as they are numerous and intricate. The conclusions to which we have arrived render the consideration of many of those questions unnecessary. We have endeavored to promote as far as possible the justice of the case, and to carry into effect the manifest design of the parties, without, at the same time, violating any of the established rules of equity practice. The case,

it must be conceded, is *sui generis*, and we expect never to look upon its like again.

Under the circumstances enumerated, and for the reasons assigned, we are of opinion, and so decide, that the rights of the several parties to the fund arising from the real estate are open for adjudication upon the present appeal.

The result of our deliberations upon the whole case is, that the creditors of Mrs. Richardson have no claim upon this real estate, and that the auditor has erroneously stated the account allowing those claims. We will sign a decree reversing the decree of Baltimore county court, and remanding the cause, with instructions to the auditor to state an account, distributing the proceeds of sale among the children or heirs of Mrs. Richardson, and not among her creditors, subject, however, to any claims which may be established against either of said heirs.

Decree reversed and cause remanded. The costs in both courts to be paid out of the proceeds of sale.

RULE IN SHELLEY'S CASE, WHEN AND WHERE OPERATES: See *Kay v. Connor*, 49 Am. Dec. 690, and note; *Myers v. Anderson*, 47 Id. 537; *Hileman v. Bouslaugh*, 53 Id. 474 and notes. The rule in *Shelley's Case*, with its modifications, prevails as a part of the system of Maryland real law: *Simpers v. Simpser*, 15 Md. 186, citing the principal case, and also quoting therefrom (p. 188), in regard to the use of the word "heirs," and in regard to the supposed intention of the donor. The principal case was cited in *Fulton v. Harmon*, 44 Md. 264, as establishing that when the word "heirs" is taken as a word of limitation, it is collective, and signifies all the descendants in all generations; but when it is taken as a word of purchase, it may denote particular persons answering the description at a particular time, and in a special sense, according to circumstances; and see also the principal case referred to on this point in *Torrance v. Torrance*, 4 Id. 24. The principal case has been frequently cited and followed on the proposition that the rule does not apply where the ancestor takes an equitable estate, and the heirs a legal estate: *Griffith v. Plummer*, 32 Id. 77; *Browne v. Trustees of the Meth. Epis. Church*, 37 Id. 121; *Shreve v. Shreve*, 43 Id. 394; and see *Torrance v. Torrance*, 4 Id. 24.

USE, WHEN EXECUTED: See *Moore v. Shultz*, 53 Am. Dec. 446, and note, where the prior cases are collected.

EFFECT OF STATUTE OF USES: See *Chapman v. Glassell*, 48 Am. Dec. 41.

TRUST, WHAT IS: See *Commissioners of the Sinking Fund v. Walker*, 38 Am. Dec. 433.

LEGAL TITLE, WHEN VESTS IN TRUSTEE: *Morton v. Barrett*, 39 Am. Dec. 575. The legal estate conveyed in trust must be commensurate with the trust: *Gould v. Lamb*, 45 Id. 187, and the word "heirs" is not necessary to create an estate in fee in trustees when such an estate is clearly essential to the purposes of the trust: *Chamberlain v. Thompson*, 26 Id. 390; *Gould v. Lamb*, *supra*. The principal case was cited in *Leonard's Lessee v. Diamond*, 31 Md. 541, to the point that a conveyance of property to a grantee and his

heirs, in trust for the separate use of the grantor for life, then on other trusts, vested the whole estate in the grantee and constituted the estates of the *cestuis que trust* mere equitable interests or chancery trusts; and also in *Locke v. Barbour*, 62 Ind. 584, to the point that a distinction is made where the direction is to permit another to receive the rents and profits, and where he is directed to pay them over, the trustee taking the legal title in the latter case, and in the former case the legal estate vesting in the person who is to receive the rents and profits.

TRUST FASTENED TO HOLDER OF LEGAL ESTATE by a gift or grant of property to be applied to a certain use or purpose: *Mary v. Michael*, 18 Md. 241; *Michael v. Mary*, 26 Id. 260; *Hawkins v. Chapman*, 36 Id. 94, all citing the principal case.

TRUSTEE OF MARRIED WOMAN'S SEPARATE PROPERTY, whether necessary: See *Carroll v. Lee*, 22 Am. Dec. 350; *McKennan v. Phillips*, 37 Id. 433, and note.

HUSBAND, WHEN WIFE'S TRUSTEE: See *Boykin v. Ciples*, 29 Am. Dec. 67; *Jackson v. McAliley*, 40 Id. 620; *Tennant v. Stoney*, 44 Id. 213; and as to his appointment as her trustee, see *Boykin v. Ciples*, *supra*; *Robinson v. Ex'rs of Dart*, 31 Id. 569.

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3. REAL ESTATE AGENT IS NOT ENTITLED TO COMPENSATION FOR MERELY INTRODUCING VENDEE TO VENDOR, unless his character as such agent was disclosed at the time of the contract. *Id.*
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3. AWARDS WILL BE SET ASIDE FOR FRAUD, MISTAKE, OR ACCIDENT, in equity, in the absence of statutes. *Muldrow v. Norris*, 313.
4. AWARD WILL BE SET ASIDE FOR MISTAKE OF LAW appearing on its face, in the reasons given by the arbitrators for their findings; although in case of a general finding, mistakes will not be inquired into by evidence aliunde. *Id.*

5. AWARD MAY BE SET ASIDE ON MOTION, under the California system of practice, the judgment thereon being *in fieri* at the time of making the motion. *Id.*

6. AWARD MAY BE SUSTAINED IN PART AND SET ASIDE IN PART, where portions of it only are bad for mistake, and the award is not attacked on the ground of fraud, and the subject-matter is in its nature divisible. *Id.*

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3. ACTION ON ATTACHMENT BOND CAN NOT BE MAINTAINED where the levy was disregarded from the first, and no evidence exists that the mere fact of the levy caused actual injury. *Id.*

4. PROCESS OF GARNISHMENT RELATES ONLY TO TIME OF ITS SERVICE; and if there is no indebtedness at that time from the garnishee to the defendant in the attachment, the plaintiff will not be entitled to judgment, although it may appear that between the time of service and answer the garnishee became indebted, and paid the debt to the defendant in attachment. *Roby v. Labuzan*, 237.
5. PROCESS OF GARNISHMENT CAN REACH ONLY LEGAL RIGHTS of the defendant; it reaches such debts as can be enforced by the defendant in the attachment by suit at the common law, and such property as would be liable to seizure and sale if the sheriff could get possession of it. It does not reach cotton in the hands of the garnishee on which the garnishee has made advances. *Id.*
6. ATTACHMENT CAN BE LEVIED ONLY ON SUCH PROPERTY AS IS SUBJECT OF LEVY and sale under execution. *Id.*
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ATTORNEY AND CLIENT.

1. APPEARANCE OF COUNSEL IS PRIMA FACIE EVIDENCE OF HIS AUTHORITY to so appear. *Piggott v. Addicks*, 547.
2. ATTORNEY WHO APPEARS WITHOUT AUTHORITY IS LIABLE in damages to the party for whom he appears. *Id.*
3. ATTORNEY'S LIEN UPON JUDGMENT IN FAVOR OF CLIENT DOES NOT ACCRUE until the judgment is entered. *Hobson v. Watson*, 632.
4. ATTORNEY NEED NOT GIVE NOTICE OF INTENTION TO RELY UPON HIS LIEN in order to retain it against the discharge of the judgment creditor under the Maine statute. *Id.*
5. ATTORNEY'S LIEN UPON CLIENT'S JUDGMENT IS INTEREST TO SAME EXTENT as if the creditor had assigned it to him as collateral security for his fees and disbursements, and he has such interest in all the legal incidents which attach to it. *Id.*
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1. BILL OF LADING IS BOTH RECEIPT FOR GOODS and contract to carry and deliver them. *O'Brien v. Gilchrist*, 676.
2. CARRIER MAY SHOW THAT HE DID NOT RECEIVE QUANTITY OF GOODS receipted for in a bill of lading, when sued for the deficiency by the shipper. *Id.*
3. WORDS "MORE OR LESS," IN BILL OF LADING that states the shipping of a certain number of pieces of lumber amounting to specified number of tons, "more or less," can not be shown by parol to have been intended by the parties to refer also to the number of pieces. *Id.*
4. BILL OF LADING IS RECEIPT SO FAR AS REGARDS CONDITION AND QUANTITY of the goods shipped, and though *prima facie* evidence of a high nature, may be controlled in this respect by parol evidence, at least as between the shipper and the carrier. *Id.*
5. CORPORATION'S POWERS AS COMMON CARRIER EXTEND TO CARRYING BANK BILLS, when constituted by its charter for the purpose of transporting goods, wares, and merchandise, and "all other articles and things usually transported by water" upon a certain lake, it appearing that bank bills were usually carried by water-craft upon such lake at the time the corporation went into operation; but it is not thereby *ipso facto* constituted a common carrier of bank bills, so as to prevent it from confining its business to carrying other dissimilar commodities. *Farmers' etc. Bank v. Champlain T. Co.*, 68.

6. COMMON CARRIER CORPORATION IS PRIMA FACIE LIABLE FOR ALL CONTRACTS FOR CARRYING made by captains of its boats, or other general agents, within the corporation's powers, and in an action for loss the *onus* rests upon it to show that a private contract was made with a captain, or credit given to him exclusively; and it is not incumbent upon the plaintiff to positively prove the corporation's consent to the captain's carrying bank bills on their account, when its charter extends to the carrying of such commodities. *Id.*
7. COMMON CARRIER IS NOT EXONERATED FROM LIABILITY FOR LOSS by the mere fact that it permitted its agent to take the perquisites of carrying the lost parcels. *Id.*
8. COMMON CARRIER'S COMMON-LAW RESPONSIBILITY CAN NOT BE LIMITED by mere general notices, when brought to the knowledge of the owner of goods carried, unless there is very clear proof that the latter expressly assented to them as forming the basis of the contract; but the carrier may thus limit his responsibility for carrying commodities beyond the line of his general business, or may make his responsibility depend upon reasonable conditions. *Id.*
9. EVIDENCE OF INTENTION OF OWNER'S AGENT TO DELIVER PACKAGE TO CARRIER'S AGENT in his official and not in his private capacity is inadmissible to charge the carrier with its loss, when not in any way made apparent to others at the time. *Id.*
10. COMMON CARRIERS ARE BOUND TO KEEP GOODS REASONABLE TIME AFTER NOTICE TO CONSIGNEES of their arrival, if it be incumbent upon them to so notify. *Id.*
11. COMMON CARRIER OF PASSENGERS BECOMES RESPONSIBLE FOR LOSS OF BAGGAGE of a passenger as soon as it is delivered to him, although such passenger may not have prepaid his fare. *Woods v. Devin*, 483.
12. LOSS BY THEFT IS NOT WITHIN EITHER OF EXCEPTIONS to the risk of a common carrier. *Id.*
13. POCKET-PISTOL AND PAIR OF DUELING-PISTOLS CARRIED BY PASSENGER in a carpet-bag, for his personal use and protection, form part of his baggage, for the loss of which a common carrier is liable. *Id.*
14. DELIVERY OF BAGGAGE TO COMMON CARRIER must be shown to make him chargeable for its loss, but any evidence tending to prove delivery is sufficient to carry the case to the jury; as where it is shown that at the time the passenger entered the carrier's vehicle his baggage was present in the hands of a servant of the carrier waiting at a hotel of which the latter was proprietor and at which the passenger was a guest, and that the servant was informed by the passenger that he wished his baggage to go with him. *Dibble v. Brown*, 460.
15. PLAINTIFF OR HIS WIFE IS COMPETENT TO PROVE CONTENTS OF LOST TRUNK in an action against a common carrier for its loss, though no spoliation by the carrier is charged, if there is no other evidence to prove the contents, but not otherwise. *Id.*
16. PASSENGER CARRIERS ARE LIABLE FOR BAGGAGE of passengers as common carriers. *Id.*
17. BAGGAGE FOR WHICH PASSENGER CARRIER IS LIABLE INCLUDES articles of necessity or personal convenience usually carried by passengers for personal use, but not merchandise or valuables carried for sale or the like, but it may, it seems, include other articles of limited value and ordinary

- bulk which a passenger may take with him, though not constituting wearing apparel or other appliances of necessity, comfort, or convenience. *Id.*
18. IN DETERMINING WHAT IS BAGGAGE, USAGE, TRAVELER'S STATION, CONDITION, and other circumstances are to be considered, and no uniform rule can be laid down. *Id.*
 19. AS TO EXTRA BAGGAGE, CARRIER MAY STIPULATE FOR COMPENSATION beyond the passenger's fare; so as to articles of a disproportionate value. *Id.*
 20. DEPOSITION AS TO CONTENTS OF PASSENGER'S TRUNK, SOME OF WHICH ARE NOT BAGGAGE, is not therefore to be excluded in an action against a carrier for its loss if any of the articles are such as are properly included in the term "baggage," the recovery being limited to the value of such articles only. *Id.*
 21. COMMON CARRIER DELIVERING GOODS TO ANY BUT OWNER DOES SO AT HIS PERIL. *Adams v. Blankenstein*, 350.
 22. COMMON CARRIER MUST SHOW DELIVERY OF GOODS TO DULY AUTHORIZED AGENT, in an action for their loss, where a delivery is made to a person other than their owner. *Id.*
 23. COMMON CARRIER NOT RELIEVED OF RESPONSIBILITY FOR LOSS by delivery of goods through mistake or gross imposition to one not their owner. *Id.*
 24. AUTHORITY TO DELIVER GOODS TO COMMON CARRIER CONFERS NO AUTHORITY TO COUNTERMAND SHIPMENT, or to take back the goods. *Id.*
 25. RESPONSIBILITY OF COMMON CARRIER BY WATER CEASES AND TRANSIT ENDS when the goods are delivered into the custody of the wharfinger upon the wharf, in the due course of business, unless there is usage to the contrary, and unless the carrier has expressly or by fair implication undertaken to do something more; and the question of time and place when the carrier's duty ends is one of contract, to be determined by the jury from the various attending circumstances. *Farmers' etc. Bank v. Champlain T. Co.*, 68.

COMMON LAW.

See CONFLICT OF LAWS, 3; CONSANGUINITY; PARENT AND CHILD, 1.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 7, 9.

CONDITIONS.

See CONTRACTS, 8, 9; DEEDS, 13; EXECUTIONS, 7.

CONDONATION.

See MARRIAGE AND DIVORCE, 7.

CONFESSIONS.

See EVIDENCE, 10-13.

CONFLICT OF LAWS.

1. IN ABSENCE OF EVIDENCE AS TO INTEREST LAW OF ANOTHER STATE, no interest can be calculated in a suit on a decree of a sister state. *Harrison v. Harrison*, 227.

2. COURT CAN NOT JUDICIALLY KNOW INTEREST ALLOWABLE IN SOUTH CAROLINA from the table required to be appended by the secretary of state to the published acts of the legislature. *Id.*
 3. COMMON LAW IS PRESUMED TO BE RULE OF DECISION IN OTHER STATES, unless the contrary is expressly shown. *Thompson v. Monrow*, 318.
 4. SUCCESSION TO AND DISTRIBUTION OF PERSONAL PROPERTY OF DECEASED PERSON are governed by the law of the country of his domicile at the time of his death. This general principle is not affected by the provision of the Connecticut statute which declares that where there are no lineal descendants of the intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." That provision was only intended to regulate the descent and distribution of the estates of the citizens of Connecticut. *Lawrence v. Kitteridge*, 385.
- See EXECUTORS AND ADMINISTRATORS, 17; HUSBAND AND WIFE, 12; JUDGMENTS, 17; TAXATION, 9.

CONSANGUINITY.

COMMON AND CANON LAW COMPUTE DEGREES OF CONSANGUINITY by commencing at the common ancestor and reckoning downward, and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other. *Kelly v. Neely*, 288.

CONSIDERATION.

See CONTRACTS, 1, 2, 11; FRAUDULENT CONVEYANCES, 3, 4; NEGOTIABLE INSTRUMENTS, 8; SALES, 12.

CONSPIRACY.

See CRIMINAL LAW, 2.

CONSTITUTIONAL LAW.

1. IN PASSING LEGISLATIVE ENACTMENT, the law-making power but announces its will as defined by the constitution. The legal consequences resulting from the act are to be determined by the judiciary. *Wright v. Wright's Lessee*, 723.
2. WHERE ACT PASSED IS BUT REGULAR EXERCISE OF LEGISLATIVE POWER, notice to the party to be affected by the same is held to be unnecessary. *Id.*
3. COURT WILL PRESUME THAT ACTION OF CO-ORDINATE BRANCH OF GOVERNMENT has been done within the constitutional limits. *Id.*
4. SEVERAL CO-ORDINATE DEPARTMENTS OF GOVERNMENT ARE SUPREME and uncontrollable within the particular limits assigned to each. *Id.*
5. ONE LEGISLATURE CAN NOT LIMIT POWER OF SUCCEEDING LEGISLATURES. *Id.*
6. "JUDGMENT OF HIS PEERS" means a trial by jury. *Id.*
7. "LAW OF THE LAND" means due process of law according to the course and usage of the common law. *Id.*
8. MARYLAND BILL OF RIGHTS CONSTRUED. *Id.*
9. DIVORCE A VINCULO MATRIMONII BY LEGISLATIVE ENACTMENT is a constitutional and valid exercise of legislative authority. *Id.*

10. LEGISLATIVE ENACTMENT AUTHORIZING COURT OF EQUITY TO DECREE DIVORCES in certain cases does not divest the legislature of all power over that subject, nor does it give courts of equity exclusive jurisdiction over it. *Id.*
11. GRANTING DIVORCE BEING BUT REGULAR EXERCISE OF LEGISLATIVE POWER, it is not within the jurisdiction of the judiciary to pronounce the act null and void. *Id.*

See CONTRACTS, 5-7; CORPORATIONS, 1-10; EMINENT DOMAIN; JUDGMENTS, 1; TAXATION, 1.

CONSTRUCTION OF CONTRACTS.

See CONTRACTS, DEEDS.

CONSTRUCTION OF STATUTES.

See STATUTES, 1, 2.

CONTRACTORS.

See CORPORATIONS, 16-20.

CONTRACTS.

1. CONSIDERATION, SUFFICIENCY OF.—Any act of the plaintiff from which the defendant derives a benefit, or from which the plaintiff may sustain any detriment or inconvenience, is a sufficient consideration to support a promise. *Holt v. Robinson*, 240.
2. PAYMENT OF INTEREST IN ADVANCE IS CONSIDERATION sufficient to support agreement for further credit. *Lime Rock Bank v. Mallett*, 673.
3. IF CONTRACT FAILS TO STATE PLACE WHERE PAYMENT IS TO BE MADE, the law fixes that at the residence of the promisor. *Patterson v. Jones*, 296.
4. WRITTEN INSTRUMENT SHOULD BE SO CONSTRUED as to give it that effect which shall best accord with the intentions of the parties to the transaction. *Menard v. Scudder*, 610.
5. BEFORE COURT SHOULD DETERMINE CONTRACT TO BE VOID AS CONTRAVENING POLICY OF STATE, where the contract is made in good faith, and stipulates for nothing that is *malum in se* or *malum prohibitum*, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. *Kellogg v. Larkin*, 164.
6. AGREEMENT IN PARTIAL OR LIMITED RESTRAINT OF TRADE IS VALID when founded upon a sufficient consideration. *Id.*
7. CONTRACT IS NOT VOID AS BEING IN RESTRAINT OF TRADE whereby the mill owners of Milwaukee agree to pay to the warehousemen a certain amount per bushel on wheat coming into the Milwaukee market, so far as they are able to control the same, and the warehousemen agree to give the mill owners the full, absolute, and uninterrupted control of the Milwaukee wheat market for a certain time, as far as they are able, by virtue of their capacity as warehousemen, or vessel and dock owners, and not to deal in wheat during that time, or make any contract for storage of wheat during that time, except as agents of the mill owners. *Id.*
8. ONE WHO PREVENTS PERFORMANCE OR HAPPENING OF CONDITION PRECEDENT, upon which his liability, by the terms of a contract, is made to

depend, can not avail himself of its non-performance. *Jones v. Walker*, 557.

9. LIABILITY UPON CONDITIONAL CONTRACT.—A. instituted suit to have a certain contract rescinded, and agreed, for a consideration, to pay B. a certain sum when such rescission was obtained. A. afterwards compromised the suit, and prevented the rescission of the contract. *Hell*, that he was liable to B. *Id.*
 10. RESCISSION OF CONTRACT CAN NOT BE SOUGHT IN EQUITY by a party whose own default caused the only obstacle to its completion, and the other party is entirely without blame. *Salmon v. Hoffman*, 322.
 11. PARTY CAN NOT RESCIND CONTRACT AND AT SAME TIME RETAIN CONSIDERATION, in whole or in part, which he has received under it. He must rescind the contract *in toto* or not at all. *Jennings v. Gage*, 476.
- See AGENCY, 1-3; ASSIGNMENT OF CONTRACTS; COMMON CARRIERS; GUARANTY; JUDGMENTS, 1; MASTER AND SERVANT; MISTAKE, 2; STATUTE OF FRAUDS; VENDOR AND VENDEE.

CONTRIBUTION.

See BONDS; SURETYSHIP, 3-9.

CONVERSION.

See TROVER.

CONVEYANCES.

See DEEDS; PUBLIC LANDS.

COPARCENERS.

See Co-TENANCY, 1.

CORPORATIONS.

1. LEGISLATURE HAS POWER TO REGULATE CORPORATIONS in the exercise of their franchises, so as to provide for the public safety, by the enactment of general laws from time to time, as the public exigencies may require. *Galena etc. R. R. Co. v. Loomis*, 471.
2. CORPORATION IS AS MUCH SUBJECT TO GENERAL POLICE LAWS OF STATE as is an individual pursuing his lawful business. *Id.*
3. ASSENT OF TOWN TO LEGISLATIVE ACT, DELIVERING PORTION OF ITS PROPERTY to trustees, may be presumed from its long acquiescence and its receipt, without objection, of the income under the provisions of the act. *Yarmouth v. North Yarmouth*, 666.
4. PUBLIC CORPORATIONS ARE SUCH AS ARE CREATED FOR PUBLIC PURPOSES ALONE, that are connected with the administration of the government, and whose whole interest and franchises are the exclusive property and domain of the government itself. *Id.*
5. LEGISLATURE, WHEN NOT LIMITED BY CONSTITUTION, HAS POWER OVER PUBLIC CORPORATIONS to impose, without infringing on private rights, such modifications, extensions, or restraints as the general interests and public exigencies may require. *Id.*
6. PRIVATE CORPORATIONS EXIST BY LEGISLATIVE GRANTS CONFERRING POWERS, rights, and privileges for special purposes, and embrace all corporations not public. *Id.*

7. GRANTS TO PRIVATE CORPORATIONS ARE CONTRACTS, which the legislature can not impair or change without the consent of the corporation. *Id.*
8. TRUSTEES INCORPORATED FOR PURPOSE OF INVESTING AND DISBURSING FOR SUPPORT OF PUBLIC SCHOOLS of a town a fund to be created by a sale of the town's property form a private corporation, independent of legislative control, unless on default in the performance of their duties judicially determined. *Id.*
9. TRUSTEES HOLDING AS PRIVATE CORPORATION FUND that they are incorporated to expend for public purposes can not be deprived of the fund, or any part of it, by legislative action. *Id.*
10. LEGISLATIVE ACT IS UNCONSTITUTIONAL THAT DIVIDES FUND held by private corporation for public school purposes in a certain town between that town and another town created by division of the former. *Id.*
11. RESIDENCE OF CORPORATION IS WITHIN STATE CREATING IT, and at the place where its principal office or place of business is. *Sangamon etc. R. R. Co. v. Morgan Co.*, 497.
12. RAILROAD COMPANY HAS NO RESIDENCE IN COUNTY through which its road and trains pass and in which its trains stop only temporarily to receive and discharge freight and passengers. *Id.*
13. CORPORATION MAY SECURE BY MORTGAGE DEBT DUE BY IT, independently of the fact of its being authorized to deal in mortgages; such power being necessarily incident to the power to borrow, and its exercise can only be restrained by express inhibition in the act of incorporation. *Susquehanna B. & B. Co. v. General Ins. Co.*, 740.
14. PROOF OF SEAL OF CORPORATION IS UNNECESSARY, when it is affixed by the proper officer or agent of the company. *Id.*
15. PERSONS ACTING PUBLICLY AS OFFICERS OF CORPORATION ARE PRESUMED TO BE RIGHTFULLY IN OFFICE; and in the absence of proof on the subject, it is not incumbent on the party claiming under the acts of an officer *de facto* to show that he has been properly elected. *Id.*
16. CORPORATION AUTHORIZED BY CHARTER TO ENTER UPON PRIVATE PREMISES and take therefrom materials for the erection of public works, and liable for compensation to the owners, is liable to the owners for the materials so taken by contractors employed by the corporation for the prosecution of a portion of the work, although the contractors were to furnish the materials and to do the work for a stipulated price. *Leshner v. Wabash Nav. Co.*, 494.
17. CONTRACTORS EMPLOYED TO PERFORM PORTION OF PUBLIC WORK BY CORPORATION chartered for that purpose are none the less the servants of the corporation because they do the work by contract and for a stipulated price. *Id.*
18. PRIVILEGES CONFERRED BY CHARTER UPON CORPORATION TO ENABLE IT TO EXECUTE a public work devolve upon contractors employed by the corporation for the same purpose. *Id.*
19. PERSON INJURED BY ACTS DONE BY THOSE IN EMPLOY OF CORPORATION and in pursuance of its charter has a right to look for compensation to the principal, who alone had authority to direct such acts. *Id.*
20. CORPORATION IS NOT RELIEVED FROM ITS PRIMARY LIABILITY FOR DAMAGES occasioned to individuals by the exercise of its chartered rights by contractors employed by the corporation merely because the contractors

may under their contract be liable over to the corporation for such damages. *Id.*

21. TRUSTEES OF TOWN POSSESS ONLY SUCH POWERS AS ARE SPECIFICALLY CONFERRED by the act of incorporation, or are necessary to carry into effect the powers expressly granted; and if they transcend the authority so conferred, their acts are not binding upon the town or third persons. *Petersburg v. Mappin*, 501.
22. TRUSTEES OF TOWN MAY SUE AND BE SUED, and take all steps necessary to assert and secure the rights of the corporation. *Id.*
23. POWER OF TRUSTEES OF TOWN TO PROSECUTE AND DEFEND SUITS on behalf of the corporation includes the power to compromise the same; and a settlement of an existing controversy, if made in good faith, binds the corporation, though if collusive it is not obligatory. *Id.*
24. MERE ERROR IN JUDGMENT WILL NOT VITIATE SETTLEMENT of controversy by trustees of town in behalf of the corporation, if made in good faith. *Id.*
25. MUNICIPALITY IS NOT LIABLE to a person whose property has been injured by a mob within its limits. *Prather v. Lexington*, 585.
26. DECLARATION WHICH CHARGES MUNICIPALITY WITH NOTICE through its officers should show when, how, and to what officers the notice was given. *Id.*
27. OFFICERS OF CITY ARE QUASI CIVIL OFFICERS OF GOVERNMENT. They are personally liable for their malfeasance or non-feasance in office, but for neither is the corporation liable. *Id.*

See COMMON CARRIERS, 5, 6; EMINENT DOMAIN; RAILROADS, 1, 2; TAXATION, 10.

COSTS.

See SURETYSHIP, 4.

CO-TENANCY.

1. COPARCENARY ESTATES AND ESTATES IN COMMON ARE RECOGNIZED AS DIFFERENT LEGAL ESTATES in Maryland, having different qualities and incidents. *Gilpin v. Hollingsworth*, 737.
2. TENANCY IN COMMON IS CREATED BY WILL by all expressions importing division by equal and unequal shares, or referring to the devisees as owners of respective or distinct interests, and even by words denoting equality. *Id.*
3. TENANCY IN COMMON IS CREATED BY WILL, AND DEVISEES TAKE BY PURCHASE, AND NOT BY DESCENT, as the will does not pass the same estate in quality or quantity that they would have taken as heirs at law, where a testator devised "all the rest and residue of my estate * * * to be divided amongst all my children, in equal shares and portions, to them, their heirs and assigns, forever." *Id.*
4. ONE OWNER IN COMMON MAY SUE, WITHOUT JOINING HIS CO-OWNER, a sheriff who has sold the entire property in the goods, on an execution against the co-owner after notice of the plaintiff's interest. *Smyth v. Tankersley*, 193.
5. SALE BY OFFICER OF ENTIRE PROPERTY IN GOODS OWNED BY TWO JOINTLY, on an execution against one of them, is an abuse of his legal authority which renders him liable as a trespasser *ab initio*. *Id.*

6. IF OFFICER SELLS ENTIRE PROPERTY IN GOODS OF CO-TENANTS ON EXECUTION AGAINST ONE, and receives the money, the other owner may waive the tort and bring *assumpsit* for the money. *Id.*

See LANDLORD AND TENANT, 1; PARTITION; PARTNERSHIP, 14, 15; TAXATION, 5.

COUNTERFEITING.

See CRIMINAL LAW, 14, 15; EVIDENCE, 14.

COURTS.

See EQUITY, 3, 17-20; JURISDICTION; PLEADING AND PRACTICE.

CREDITOR'S BILL.

See EQUITY, 7, 8, 21.

CRIMINAL LAW.

1. WHERE ONLY COVERING TO OPENING FOR WINDOW is a cloth hung over two nails at the top, and loose at the bottom; whether the removal of the cloth from one of the nails is a sufficient breaking to constitute burglary, *quære*. *Hunter v. Commonwealth*, 121.
2. CONSPIRACY TO COMMIT ASSAULT AND BATTERY UPON DEPUTY SHERIFF, in order to prevent him from performing his official duties, is illegal. *State v. McNally*, 650.
3. ADULTERY MAY BE COMMITTED BY MARRIED MAN WITH UNMARRIED WOMAN; so incestuous adultery, but the woman in such a case is guilty only of incestuous fornication. *Cook v. State*, 410.
4. INDICTMENT CHARGING OFFENSE ON CERTAIN DAY AND DIVERS OTHER DAYS, etc., is good, the latter words being surplusage. *Id.*
5. INDICTMENT MAY CHARGE OFFENSE ON ANY DAY PRIOR to the finding thereof, and the crime may be proved on any day within the statute of limitations. *Id.*
6. INDICTMENT CHARGING OFFENSE IN LANGUAGE OF CODE creating it, or so plainly and distinctly that the jury can clearly understand its nature, is sufficient. *Id.*
7. INDICTMENT FOR INCESTUOUS ADULTERY BY FATHER WITH DAUGHTER, averring that on certain days the defendant, being a married man, did commit divers acts of incestuous adultery by cohabiting and having sexual intercourse with one L. C., etc., she, the said L. C., being then and there the daughter of him, etc., without stating that the said L. C. was his legitimate daughter of the whole blood by her mother, to whom he was legally married, is good. *Id.*
8. INDICTMENT FOR LIVING "TOGETHER IN FORNICATION" found against a man and woman is sufficient, without stating the facts which enter into the composition of the offense. *Lawson v. State*, 182.
9. INDICTMENT FOR FORGERY WILL NOT BE QUASHED ON GROUND that it does not charge that the forged bank bill alleged to have been passed was passed as a true one, when it does charge the bill to have been uttered and paid as true. *McCartney v. State*, 510.
10. INDICTMENT FOR FORGERY OF PROMISSORY NOTE need not set out the indorsements, or any other matter written upon the same paper consti-

- tuting no part of the note itself, and not entering into the essential description of that instrument. *Perkins v. Commonwealth*, 123.
11. INDICTMENT FOR PERJURY must not only allege the materiality of the evidence given by the accused, but must also show that the court had jurisdiction of the case in which the alleged perjury was committed. *Commonwealth v. Pickering*, 158.
12. INDICTMENT WILL LIE FOR MISDEMEANOR, where a trespass *quare clausum fregit* is accompanied by acts constituting a breach of the peace. *Henderson v. Commonwealth*, 160.
13. COURT MAY INSTRUCT JURY THAT IF THEY ARE SATISFIED THAT NOTE described in an indictment for forgery in passing it was forged and false, no proof is necessary of the existence of the bank upon which it purported to be. *McCartney v. State*, 510.
14. NAMES OF PERSONS WHO ARE COMPETENT JUDGES OF GENUINENESS OF BANK BILLS may be ascertained by the prosecuting attorney from a witness upon the trial of an indictment for forgery in passing a counterfeit bank bill. *Id.*
15. UTTERING OF OTHER COUNTERFEIT BANK NOTES OF SAME AND OTHER BANKS may be given in evidence on the trial of an indictment for passing a counterfeit bank note to show guilty knowledge, although indictments have been found upon such utterings and convictions or acquittals had upon them. *Id.*
16. ON CHARGE OF ILLICIT INTERCOURSE WITHIN LIMITED PERIOD, EVIDENCE OF ACTS ANTERIOR to such period may be adduced in explanation of acts of a similar character within that period, although such former acts if treated as an offense would be barred by the statute of limitations; evidence of this character would not however be admissible as independent testimony, but should be received when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined. *Lawson v. State*, 182.
17. ON CHARGE OF ILLICIT INTERCOURSE, EVIDENCE OF IMPROPER FAMILIARITIES, explained by the fact of prior intercourse, may be corroborated by proof of subsequent illicit connection. *Id.*
18. EVIDENCE THAT DEFENDANT REFUSED TO PAY FOR SERVICES OF PHYSICIAN rendered during the confinement of his co-defendant, and his statements that the child was not his, not being connected with any conversation or admission offered by the state, is not admissible on the trial of a man and woman jointly indicted for living together in fornication. *Id.*
19. FACT OF ILLICIT INTERCOURSE CAN VERY RARELY BE DIRECTLY PROVED, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances. *Id.*
20. FACT THAT UNMARRIED WOMAN IS SEEN IN NIGHT-TIME AT HOUSE OF SINGLE MAN, who is sick at the time, in company with her mother, by itself and unconnected with every other fact, proves nothing; but when offered in connection with other evidence proving illicit intercourse between them, becomes relevant, on their joint indictment for living together in adultery." *Id.*

21. CONVERSATION SHORTLY AFTER BIRTH OF CHILD BETWEEN MOTHER OF DEFENDANT AND PHYSICIAN who attended the defendant during her confinement, as to the means by which the physician was to obtain his fee, during which the defendant remains silent, is not admissible against the defendant on an indictment of her and her co-defendant for living together in fornication. *Id.*

See EVIDENCE, 10-14, 20; NEW TRIAL, 1.

DAMAGES.

1. SOME DAMAGES NECESSARILY RESULT FROM EVERY WRONGFUL INVASION of another's property, and the law does not require any distinct injury to be shown, in order to justify a recovery therefor. But in the case of property of an individual included in a highway, the mere entry upon it is not an infringement of his right, unless such entry be unauthorized. *Nicholson v. New York etc. R. R. Co.*, 390.
2. DAMAGES FOR REMOTE AND SPECULATIVE LOSS OF PROFITS CAN-NOT BE ALLOWED, and an award rendered upon such basis will be set aside. *Muldrow v. Norris*, 313.
3. EXEMPLARY DAMAGES may be awarded in actions upon the case as well as in actions of trespass. *Fleet v. Hollenkemp*, 563.
4. VERDICT MAY BE SET ASIDE WHEN DAMAGES ARE UNEXAMPLED AND UNJUSTIFIABLE. *McDaniel v. Baca*, 339.
5. VERDICT FOR DAMAGES WILL NOT BE SET ASIDE AS EXCESSIVE, where the amount of the damages is a matter of opinion, and some of the evidence tends to show that they were estimated too high, while other evidence tends to show that they were estimated too low, if there is no evidence tending to show that the jury acted corruptly or disregarded the instructions of the court. *Nicholson v. New York etc. R. R. Co.*, 390.

See ATTORNEY AND CLIENT, 2; BAILMENTS; CORPORATIONS, 16-20, 25; DRUGGISTS; HIGHWAYS, 3, 6, 7; LANDLORD AND TENANT, 4, 5; MORTGAGES, 20.

DEBTOR AND CREDITOR.

DEBT IS NOT CORPUS CAPABLE OF LOCAL POSITION; consequently it attaches to the person of the creditor, though its payment is secured by an hypothecation upon immovable property. *Newcomer v. Orem*, 717.

See FRAUDULENT CONVEYANCES; MORTGAGES; PARTNERSHIP, 4-6, 10, 12, 13; PAYMENT.

DECLARATIONS.

See CRIMINAL LAW, 21; DEDICATION, 2; EVIDENCE, 10-17.

DECREES.

See CONFLICT OF LAWS; EQUITY, 14, 20; JUDGMENTS, 3-6, 8; MARRIAGE AND DIVORCE, 5; MORTGAGES, 11, 16; PLEADING AND PRACTICE, 27, 30.

DEDICATION.

1. NO PARTICULAR CEREMONY IS REQUIRED TO MAKE DEDICATION, nor is any time prescribed by law as essential to securing the enjoyment; dedications may be presumed from facts and circumstances proved; and so

may the assent of the owner of the land and the acceptance by the public.
Cole v. Sprowl, 696.

2. DECLARATIONS AS WELL AS ACTS OF OWNER MAY BE EVIDENCE OF DEDICATION of land by him for a road. *Id.*

DEEDS.

1. WHERE OMISSION OF SEALS OR SCROLLS TO DEED raises a cloud over the title to land, the same should be rectified before a sale is made, under a deed of trust, to secure the purchase money. *Bryan v. Stump*, 139.
2. DEED WILL BE CONSTRUED AS FEOFFMENT OR AS DEED OF BARGAIN AND SALE, as will most effectually accomplish the grantor's intention, if the case be one where his intention is to prevail against the strict rules of interpretation. *Ware v. Richardson*, 762.
3. CONVEYANCE SHALL OPERATE AT COMMON LAW, unless the intention of the parties appears to the contrary, whenever a conveyance may take effect either at common law or under the statute of uses. *Id.*
4. DEED INOPERATIVE AS CONVEYANCE IS GOOD AS CONTRACT TO CONVEY as against the principal, where it is improperly executed by an authorized agent in his own name. *Salmon v. Hoffman*, 322.
5. DEED IS EFFECTUALLY DELIVERED, THOUGH GRANTEE IS NOT PRESENT nor any one on his behalf, and though the grantor retains control of it, if it be signed and sealed and declared by the grantor, in the presence of attesting witnesses, to be delivered as his deed, and there be nothing to qualify the delivery. *Rushin v. Shields*, 436.
6. STATEMENT IN ATTESTATION CLAUSE THAT DEED WAS DELIVERED is not sufficient proof of delivery to entitle it to be recorded. *Id.*
7. DELIVERY OF DEED MAY BE INFERRED FROM POSSESSION OF IT, or of the land conveyed thereby, by the grantee, but this is not sufficient to make a certified copy of the record of such deed evidence if the probate does not show delivery. *Id.*
8. OBJECT OF RECORDING CONVEYANCES IS MERELY TO GIVE NOTICE thereof, but their validity depends on other circumstances. Such records often furnish but very imperfect information of the real state of the titles. *Cowles v. Bacon*, 371.
9. IRREGULARLY RECORDED DEED IS NOT NOTICE. *Rushin v. Shields*, 436.
10. PROBATE OF DEED OMITTING TO SHOW DELIVERY DOES NOT ENTITLE IT TO RECORD so as to make a certified copy of the record admissible as evidence, as where the witness, upon whose affidavit the deed is recorded, swears only that he saw the grantor sign and seal it. *Id.*
11. PROOF THAT SUBSEQUENT PURCHASER HAD ACTUAL NOTICE OF PRIOR UNRECORDED DEED must be clear and positive, so as to leave no reasonable doubt that the taking of the second conveyance was an act of bad faith towards the first purchaser. *Rogers v. Wiley*, 491.
12. SUBSEQUENT PURCHASER IS NOT PUT UPON INQUIRY AS TO EXISTENCE of a prior unrecorded deed, by information of the possible existence of such a deed, when from the same informant he learns that it was to be canceled. *Id.*
13. CONDITIONS IN DEED CAN BE RESERVED ONLY FOR GRANTOR AND HIS HEIRS, and the right of re-entry for a breach pertains to the grantor and his legal representatives alone. *Bangor v. Warren*, 657.

14. DEED CAN BE AVOIDED ON GROUND THAT GRANTEE WAS NOT LEGALLY AUTHORIZED to receive it, only by the grantor or by some one privy in estate. *Id.*

See DOWER, 3; EVIDENCE, 2, 3; MARRIED WOMEN, 1, 2, 8; "SHELLEY'S CASE;" TRUSTS, 1, 5, 9-15.

DEFINITIONS.

See CONSTITUTIONAL LAW, 6, 7; "SHELLEY'S CASE;" WILLS, 11.

DELIVERY.

See DEEDS, 5-7; SALES, 11.

DEMURRER.

See PLEADING AND PRACTICE, 7.

DEPOSITIONS.

See WITNESSES, 6.

DEPUTIES.

See SHERIFFS, 2.

DESCENT.

See "SHELLEY'S CASE;" WILLS, 8, 10, 13.

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS, 12.

DEVICES.

See GIFTS; WILLS.

DIVORCE.

See CONSTITUTIONAL LAW, 9-11; MARRIAGE AND DIVORCE, 3-5.

DOMICILE.

See CORPORATIONS, 11, 12; HUSBAND AND WIFE, 1; MARRIAGE AND DIVORCE, 3; TAXATION, 3, 10.

DORMANT PARTNERS.

See PARTNERSHIP, 1.

DOWER.

1. WIFE HAS NO RIGHT OF DOWER IN LAND PURCHASED BY HUSBAND AND MORTGAGED BACK contemporaneously by the husband and wife to the grantor to secure the payment of the purchase money. *Eslava v. Le-preire*, 266.
2. DOWER, PROVIDED BY LAW IN BEHALF OF WIDOW, IS PARAMOUNT to all conveyances, contracts, incumbrances, debts, or liabilities of the husband executed or incurred by him during coverture. *Higginbotham v. Cornwell*, 130.
3. WHEN HUSBAND DURING COVERTURE SELLS AND CONVEYS LAND with general warranty and his wife did not join in the deed, and the husband

afterwards willed the whole estate, real and personal, to his wife for life, remainder to his children, she will not only be entitled to take under the will, but also be allowed her dower in the land sold. *Id.*

4. IN ORDER THAT PROVISION FOR WIFE in her husband's will shall be held to be in lieu of dower, the will must so declare in terms. *Id.*

See GUARDIAN AND WARD, 3.

DRUGGISTS.

DRUGGIST'S DUTY IS TO SO QUALIFY HIMSELF, or to employ those who are so qualified, to attend to the business of compounding and vending drugs and medicines, that one drug may not be sold for another, and so that when a prescription is presented to be made up none but the proper medicines shall be used in mixing and compounding it. If his customer is injured by the mistake of the druggist or his clerk in using one drug for another, the druggist is not exonerated because due and reasonable or even extraordinary or unusual care and diligence were used. *Fleet v. Hollenkemp*, 563.

See MASTER AND SERVANT, 8.

EJECTMENT.

See TRESPASS, 2.

EMINENT DOMAIN.

LEGISLATURE HAS POWER TO DELEGATE TO RAILROAD CORPORATION AUTHORITY TO ALTER and repair highways, subject to the liability of making compensation for the property taken or the injury occasioned thereby. *Nicholson v. New York etc. R. R. Co.*, 390.

See CORPORATIONS, 16.

EMPLOYER AND EMPLOYEE.

See LIENS, 7; MASTER AND SERVANT.

EQUITY.

1. DISTINCTION BETWEEN LAW AND EQUITY AS TO ACTIONS IS NOT ABOLISHED by the California practice act in providing that "there shall be but one form of civil action;" the innovation extends only to the form of the action and the pleadings. *De Witt v. Hays*, 352.
2. TO ENTITLE PLAINTIFF TO EQUITABLE INTERPOSITION UNDER REFORMED PROCEDURE, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate relief at law. *Id.*
3. SUPREME COURT OF MAINE DOES NOT POSSESS GENERAL EQUITY POWERS, but is authorized to act as a court of equity only in certain cases pointed out in the statute. *Soutter v. Atwood*, 647.
4. EQUITY WILL NOT RESTRICT OPERATION OF GENERAL RELEASE when it was such a paper as was intended to be executed, but the parties might have mistaken its operation, or had not that in mind. *Fletcher v. Jackson*, 98.
5. WHERE NEITHER FRAUD, MISTAKE, NOR SURPRISE IS PROVED, a court of equity will not interfere to reform an agreement or a deed when it is such as the parties designed it to be. *McElderry v. Shipley*, 703.

6. WANT OF VIGILANCE IS BAR TO RELIEF IN EQUITY as well as at law, as where one takes an assignment of a contract after sundry breaches, of which he might have known if he had used ordinary diligence, and then seeks compensation therefor, or pays certain notes forming the consideration of the assigned contract, with full knowledge or means of knowledge that they were drawn for too much, and then seeks repayment of the overplus. *Marshall v. Means*, 444.
7. JUDGMENT CREDITOR HAS RIGHT TO PURSUE EQUITABLE ESTATE of his debtor in a court of chancery and have it set apart to the payment of his debt. *Lang v. Brown*, 244.
8. INTEREST OF ONE OF SEVERAL CO-DISTRIBUTEES IN INTESTATE'S ESTATE MAY BE CHARGED in chancery, by a judgment creditor, for the payment of his debt; but in order to do this, it is indispensably necessary that the chancellor should proceed to make a final settlement of the administration, and separate the portion of the judgment debtor from the remainder of the estate before a final decree can be pronounced condemning such portion to the payment of the demand. *Id.*
9. OBJECTION OF MULTIFARIOUSNESS IS DISCOURAGED by the courts where it would defeat instead of promote the ends of justice. *Marshall v. Means*, 444.
10. NO GENERAL RULE EXISTS FOR DECIDING WHEN BILL IS MULTIFARIOUS, but it must be left to the discretion of the court in each case. *Id.*
11. BILL IS MULTIFARIOUS WHICH DEMANDS SEVERAL DISTINCT MATTERS of distinct natures of several defendants, or several entirely unconnected matters of one defendant, as where the assignee of a bond for the conveyance of land files a bill against his assignor and the original vendor to remodel and enforce the agreements between the defendants and between the complainant and his assignor, and claims also of the original vendor compensation for holding over, and for removing fences and manure, etc. *Id.*
12. COMPLAINANTS HAVING ASKED FOR RELIEF AS HEIRS OF A. can not recover as the heirs of B., although the proof adduced shows them to be such, as they can only recover on the validity of their title stated in their bill. *Maulding v. Scott*, 298.
13. ORATORS SHOULD FILE SUPPLEMENTAL BILL stating the grounds upon which they desired to contest the release, in order to have the matters properly in issue before the court, on the coming in of the answer setting up a release of the defendant's liability, where the orators desire to restrict its operation. *Fletcher v. Jackson*, 98.
14. JURISDICTIONAL FACTS STATED IN BILL MUST BE DEEMED TO BE TRUE in a suit on a decree, when the decree is collaterally attacked. *Harrison v. Harrison*, 227.
15. ANSWER IS NOT EVIDENCE EXCEPT SO FAR AS RESPONSIVE to the bill; whenever matter in discharge or avoidance is asserted, or new and substantive claims are advanced, they must be established by proof. *Buck v. Swazey*, 681.
16. ANSWER IS TO BE TAKEN AS TRUE, as it was not put in issue by a replication, where it was agreed that the cause should be submitted on bill and answer. *Ware v. Richardson*, 762.
17. ORDER OF REFERENCE IS IRREGULAR IF ONE OF PARTIES WAS NOT BEFORE COURT. It is irregular in a chancery proceeding to take any order gen-

erally affecting the merits of the case until it is at issue as to all parties; this is not excused by the supposition that the party not before the court was not a necessary one. It is enough that he was represented by the bill as having some interest in the subject-matter of the suit, and is regularly made a party by proper allegations and prayer for subpoena to bring him in. *Eslava v. Lepretre*, 266.

18. INSTRUCTIONS BY CHANCELLOR TO MASTER ON ORDER OF REFERENCE can not be disregarded by him, and he can not act in opposition to them. *Lang v. Brown*, 244.
19. REPORT OF MASTER UNDER ORDER OF REFERENCE by chancellor will not be permitted to stand, where the master disregarded the instructions and directions of the chancellor, and where the report did not furnish the facts necessary to enable the court to proceed to a final decree on the merits of the case, although no exceptions had been taken to it. *Id.*
20. COURT CAN NOT MAKE ORDER INCONSISTENT WITH ORIGINAL DECREE. From the time of pronouncing the decree, all the subsequent proceedings should be consistent with it. *Id.*
21. IRREGULARITY, IF SUCH IT BE, IN THAT CREDITOR'S BILL AND BILL FOR DISTRIBUTION HAVE BEEN UNITED in the same proceeding, or one converted into the other, in the court below, by agreement of the parties, can not be taken advantage of on appeal. *Ware v. Richardson*, 762.

See ARBITRATION AND AWARD, 3; ASSIGNMENT OF CONTRACTS; CONSTITUTIONAL LAW, 10; EVIDENCE, 1; EXECUTORS AND ADMINISTRATORS, 7; INJUNCTIONS; JUDICIAL SALES; JUDGMENTS, 2-8, 23-25; JURISDICTION, 1; MISTAKE, 2, 5, 6; PARENT AND CHILD, 8, 9; PARTNERSHIP, 3, 8, 13; PLEADING AND PRACTICE, 27, 30; PROBATE COURTS; SPECIFIC PERFORMANCE; TAXATION, 14, 16; TRESPASS, 1; VENDOR AND VENDEE, 8-10.

ERROR.

See NEW TRIAL; PLEADING AND PRACTICE, 15-24, 29-36.

ESTATES OF DECEDENTS.

See CONFLICT OF LAWS, 4; EQUITY, 8; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD, 4, 6; HUSBAND AND WIFE, 11, 13.

ESTATES TAIL.

See WILLS, 17.

ESTOPPEL.

1. OWNER OF LAND IS ESTOPPED FROM SETTING UP TITLE AGAINST INNOCENT PURCHASER, where he stands by and sees another sell it without making known his claim. *Per Heydenfeldt, J. Godeffroy v. Caldwell*, 360.
2. OWNER OF LAND IS ESTOPPED FROM SETTING UP RIGHT, where he knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title. *Per Heydenfeldt, J. Id.*
3. WHERE ONE BY WORDS AND ACTIONS INTENTIONALLY CAUSES ANOTHER TO BELIEVE in the existence of a certain state of things, and thereby induces him to act on that belief so as to injuriously affect his previous position, he is concluded from averring a different state of things as existing at the time. *Cowles v. Bacon*, 371.

See EXECUTIONS, 15, 17.

EVIDENCE.

1. RECORD OF FORMER PROCEEDING IN EQUITY IS NOT ADMISSIBLE in evidence unless the same is certified under the seal of the clerk of the court, or proved under a commission. *Eyler v. Crabbs*, 711.
2. CERTIFIED COPY OF RECORD OF DEED NOT ENTITLED TO RECORD, because it is one which the law does not require to be recorded, or because, though required to be recorded, it is not proved or attested as provided by statute so as to admit of its registration, is inadmissible in evidence. *Rushin v. Shields*, 436.
3. ADMITTING COPIES OF DEEDS FROM RECORDS IS GREAT RELAXATION OF RULE of the common law, and is productive of many frauds, and the requisites of the statute should be complied with before allowing this mode of proof. *Id.*
4. MASTER'S PROTEST IS ADMISSIBLE IN EVIDENCE to impeach testimony of master rendered after protest had been made. *McDowell v. General Mut. Ins. Co.*, 619.
5. RECEIPT MAY BE CONTRADICTED BY PAROL EVIDENCE. *O'Brien v. Gilchrist*, 676.
6. PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY REAL PROPERTY indicated in a contract for its sale, and described therein with sufficient certainty so that it can be thus identified. *Colerick v. Hooper*, 505.
7. WRITTEN ORDER OR LETTER OF CREDIT addressed to W. & W. may be proved to have been intended for W., W. & Co., so as to hold the writer bound to the latter firm, and it may be introduced in evidence. *Wadsworth v. Allen*, 137.
8. CONTENTS OF LOST INSTRUMENT CAN NOT BE PROVED unless it appears that reasonable search has been made in the place where the paper was last known to have been, and if not found there, that inquiry has been made of the person last known to have had its custody. *Fletcher v. Jackson*, 98.
9. SECONDARY EVIDENCE OF CONTENTS OF EXECUTION IS ADMISSIBLE where it is proved that diligent search was made for it both by the clerk who is the keeper of the records and by the plaintiff's attorney; the presumption is that it was then lost, and this presumption continues until there is some evidence that it has been found since the search was made. *Poe v. Dorrah*, 196.
10. CONFESSION OR DECLARATIONS OF ACCOMPLICE made after the commission of the offense are evidence against him only unless made in the presence of his partners in the crime. *Hunter v. Commonwealth*, 121.
11. CONFESIONS FREELY AND SOLEMNLY MADE are the highest evidence, as a general rule, and exceptions to the rule should not be allowed except on unassailable grounds. *Cook v. State*, 410.
12. CONFESSIONS OF ONE DEFENDANT, ON TRIAL OF TWO JOINTLY FOR ILLICIT INTERCOURSE, are admissible against the party making them. *Lawson v. State*, 182.
13. CONFESSIONS OF ONE DEFENDANT TENDING TO PROVE SUBSEQUENT ILLICIT INTERCOURSE are admissible against the party making them on the trial of an indictment of two defendants jointly for living together in fornication, if their relevancy is shown from facts subsequently offered in evidence. *Id.*

14. DECLARATIONS OF DEFENDANT MADE AT TIME OF PASSING OTHER COUNTERFEIT BANK NOTES than that charged in the indictment are admissible as part of the *res gestæ*. *McCartney v. State*, 510.
 15. DECLARATIONS AT TIME OF MAKING CONTRACT are part of the *res gestæ*, and may be given in evidence in an action to enforce it, where the defense is that it was procured by false and fraudulent representations. *Crump v. United States Mining Co.*, 116.
 16. DECLARATIONS OF THIRD PERSONS ARE INADMISSIBLE IN EVIDENCE, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation exists. *Kilburn v. Ritchie*, 326.
 17. ADMISSIBILITY OF DECLARATIONS OF THIRD PERSONS MUST BE ESTABLISHED by the party offering them, by showing the time and circumstances under which they were made; and if it does not appear in the record that this was done, it will be presumed that the court below properly refused to admit them. *Id.*
 18. EVIDENCE PRIMA FACIE IRRELEVANT MAY BE REJECTED at the time it is offered, or the court may let it in and repudiate it, if, after all is heard, it is still irrelevant. *Lawson v. State*, 182.
 19. COURT COMMITS NO ERROR IN ADMITTING IRRELEVANT TESTIMONY, if it appears affirmatively from the record that the evidence became relevant by its connection with other testimony subsequently offered. *Id.*
 20. TESTIMONY OF COMPLAINANTS IN INDICTMENT AS TO REASONS THAT INDUCED THEM to believe their charges true, and as to their purpose in making them, may be excluded upon the trial, as it could have no effect upon the rights or liabilities of the defendants. *State v. McNally*, 650.
 21. POSITIVE EVIDENCE PREPONDERATES OVER NEGATIVE in weighing contradictory testimony, other things being equal; but the jury's attention, in the application of this rule, should be directed to the facts and circumstances of the case, to prevent its unjust operation. *Farmers' etc. Bank v. Champlain T. Co.*, 68.
- See ATTACHMENTS 10; COMMON CARRIERS, 2-4, 14, 15, 18, 20; CONFLICT OF LAWS; CORPORATIONS, 14, 15; CRIMINAL LAW, 14-21; DEDICATION; DEEDS, 7, 10, 11; EQUITY, 15, 16; FRAUD, 3-6; JUDGMENTS, 10, 11, 22; MARRIAGE AND DIVORCE, 1, 2; NEGOTIABLE INSTRUMENTS, 9; NEW TRIAL, 1-4; PARENT AND CHILD, 3-6; PLEADING AND PRACTICE, 20, 25; WITNESSES.

EXCESSIVE DAMAGES.

See DAMAGES, 4, 5.

EXECUTIONS.

1. EXECUTION MUST PURSUE AND BE WARRANTED BY JUDGMENT as a general rule, but misstating the date of the judgment in the execution, if it describes and identifies it so as to render certain the authority upon which it issued, is sufficient to invest the sheriff with authority to sell, and in a collateral proceeding will sustain a sale. *Sprott v. Reid*, 549.
2. ALIAS EXECUTION, WHERE ORIGINAL IS LOST, should not be issued, but a copy should be established. *Rushin v. Shields*, 436.
3. ALIAS EXECUTION CAN NOT BE COLLATERALLY ATTACKED, though improperly issued upon loss of the original, if issued by the order of a court of competent jurisdiction. *Id.*

4. ARREST OF JUDGMENT DEBTOR IS ONE MODE AUTHORIZED BY LAW for the collection of the debt. *Hobson v. Watson*, 632.
5. BOND GIVEN UNDER STATUTE FOR RELEASE OF JUDGMENT DEBTOR from arrest is a substitute for the custody of the debtor, and is a legal incident attached to the judgment and execution. *Id.*
6. PORTION OF QUARTER-SECTION OF LAND SOLD ON EXECUTION AS ONE TRACT can not be redeemed by paying the proportionate price received for that part, although the judgment debtor have title to that part only; but the sale being entire must stand as such or be wholly vacated. *Hawkins v. Vineyard*, 487.
7. RIGHT OF ENTRY FOR BREACH OF CONDITION IN DEED CAN NOT BE TAKEN IN EXECUTION by the grantor's creditor, under the Maine statute allowing creditor to take in execution "all rights of entry into land" of his debtor. The rights of entry subjected to execution by the statute are confined to those cases where the debtor has been ousted or dispossessed of a freehold. *Bangor v. Warren*, 657.
8. DELAY BY CREDITOR IN LEVYING EXECUTION FOR HIS DEBT, for purpose of allowing prior creditors to attach, can not affect the question of his right to property levied on. *Id.*
9. LEVY OF EXECUTION FOR SUM EXCEEDING AMOUNT OF JUDGMENT, including the debt, costs, and interest, and the charges of levy, by fourteen cents, is void, and as there can be no apportionment of the land taken, it is wholly invalid. *Glidden v. Chase*, 690.
10. EXCESSIVE LEVY IS INVALID where the excess is more than the value of any coin which by statute is made legal tender, *semble*. *Id.*
11. LEVY ON REAL ESTATE WHICH INCLUDES OFFICER'S FEES AND CHARGES NOT AUTHORIZED by law is valid. The creditor has no control over the acts or fees of the officer in such a case, and ought not to suffer by his official misconduct. *Id.*
12. FACT THAT CREDITOR, WHEN HE LEVIED HIS EXECUTION ON LANDS of his debtor, had notice, from the records or otherwise, that the latter had executed a conveyance of the property levied on, but erroneously supposed that such conveyance was fraudulent and void as to him, does not release the debtor from his obligation to pay the unsatisfied balance of the debt. *Cowles v. Bacon*, 371.
13. PLAINTIFF'S RELEASE OF LEVY ON PROPERTY CLAIMED BY THIRD PERSON, who interposes his claim to try the right of property, does not exempt the sheriff from neglect to make the execution out of property which in fact belongs to the plaintiff. *Poe v. Dorrah*, 196.
14. LAW REQUIRING SHERIFF TO SELL PROPERTY at not less than two thirds its appraised value is mandatory. *Sprott v. Reid*, 549.
15. IRREGULARITIES IN SALE OF LAND BY SHERIFF DO NOT AVOID SALE, but a sale upon another day than that provided by law will, unless consented to by the execution creditor. His being present at the sale, choosing valuers of the land, and not objecting, is an implied consent. *Casey v. Gregory*, 581.
16. EXECUTION SALE OF LAND, DURING TERM OF FIVE YEARS' LEASE, which lease although unrecorded is good, and under which the lessee held during his term, passes the subsequently accruing rent to the purchaser. *Id.*

17. LANDLORD'S PROPERTY BEING SOLD UNDER EXECUTION MAY BE PURCHASED by tenant in possession thereof, and he is not estopped by the relation which exists between them. *Id.*
18. EXECUTION CREDITOR SHOULD KNOW WHEN TIME TO REDEEM EXPIRES, and misinformation by the clerk, in which the purchasers had no agency, is not such an equity as will cause a court of equity to extend the time. *Id.*
19. DISTINCTION BETWEEN SALES UNDER SPECIAL POWER AND SHERIFFS' SALES on execution from courts of general jurisdiction is, that as to the former the execution of the power must show on its face that the statute was strictly complied with, as in tax collectors' and administrators' sales, while as to sheriffs' sales it is otherwise. *Brooks v. Rooney*, 430.
20. RECITALS IN SHERIFF'S DEED NEED NOT SHOW NOTICE AND SALE given and made according to law, nor is extrinsic proof of those facts necessary to support the deed. *Id.*
21. ABSENCE OR IRREGULARITY OF RETURN OF SALE ON EXECUTION, or of extrinsic proof that the sale was made, does not affect the title of a purchaser under a sheriff's deed. *Id.*
22. ERRORS OF OMISSION OR COMMISSION BY SHERIFF AFTER EXECUTION SALE, over which the purchaser has no control, do not impair his title. *Id.*
23. EXECUTION PURCHASER'S TITLE DEPENDS ON JUDGMENT LEVY AND DEED, and other questions are between the parties to the judgment and the officer. *Id.*
24. STATUTES PRESCRIBING NOTICE TO BE GIVEN OF SHERIFF'S SALE ARE DIRECTORY, and a neglect to observe the directions, though it may render the sheriff liable to the party injured, will not impair the purchaser's title if there be no collusion. *Id.*
25. SHERIFF'S DEED IS NOT INVALIDATED BY DEATH OF EXECUTION DEBTOR after judgment and execution, but before levy, though his heirs are minors and there is no personal representative on his estate. *Id.*
26. DEATH OF DEFENDANT IN EXECUTION BEFORE SALE, where the judgment was *in rem* and a lien upon the property sold, does not affect the validity of the sale. *Sprott v. Reid*, 549.
27. INNOCENT PURCHASER AT SHERIFF'S SALE MAY ACQUIRE GOOD TITLE, notwithstanding such sale is brought about through the fraud of others. *Spindler v. Atkinson*, 755.
28. PURCHASER AT SHERIFF'S SALE TAKES ALL THAT GRANTOR OWNED IN PROPERTY at the time of a prior conveyance thereof which is void as to creditors; and if questions subsequently arise as to the *bona fides* of the deed, they must be settled between the purchaser and those claiming under it. *Id.*
29. APPLICATION OF MONEY TO JUNIOR EXECUTION BY DIRECTION OF ELDER EXECUTION CREDITOR by the sheriff operates as a *pro tanto* satisfaction of the elder writ, though the money was made on the junior execution. *Rushin v. Shields*, 436.
30. SHERIFF RECEIVING NOTE FROM DEFENDANT INSTEAD OF MONEY, and returning the execution satisfied, can not set aside the return and have another execution issue. So far as he was concerned, he could only look to that which he had voluntarily elected to receive as a satisfaction; and a note given by the executor of the execution defendant to the sheriff, on the condition that he will not amend his return of execution satisfied,

is without consideration, and the officer is not placed in a better condition by the fact that he agreed to pay the judgment, and that the note was executed with a full knowledge of all the facts. *Holt v. Robinson*, 240.

See ATTACHMENTS, 6; ATTORNEY AND CLIENT, 8; CO-TENANCY, 4-6; EVIDENCE, 9; JUDGMENTS, 9, 18, 21, 22; SHERIFFS, 1; TRUSTS, 18, 20, 21.

EXECUTORS AND ADMINISTRATORS.

1. OFFICIAL BOND OF EXECUTOR which contains the names of the executor and several sureties in the penal part, and there is no blank for an additional name, and which is signed by those whose names appear in the penal part and that of another person, will be treated as the bond of the person who executed it, notwithstanding the absence of his name in the penal part. *Luster v. Middlecoff*, 129.
2. EXECUTOR, WHO MEANS TO LIMIT HIS LIABILITY to pay his testator's debts, should add the words "as executor out of the estate of" testator. *Snead v. Coleman*, 112.
3. EXECUTOR MAY BIND HIMSELF PERSONALLY to pay the debt of his testator. *Id.*
4. ADMINISTRATOR HAS NO AUTHORITY TO MORTGAGE DECEDENT'S REAL ESTATE to extinguish the mortgagee's dower right in other portions; and the mortgagee can not assert a claim in the mortgaged premises against the creditors of the estate unless it appears that some portion of the avails of the sale of her dower right has been actually paid over to such creditors. *Green v. Sargeant*, 88.
5. ADMINISTRATOR HAS NO RIGHT TO PURCHASE ESTATE UPON WHICH HE ADMINISTERS, even when he is solvent and pays full price. *Id.*
6. ADMINISTRATOR'S ACCOUNTING IN PROBATE COURT WILL NOT CONCLUDE PROCEEDINGS IN EQUITY against him to compel a release, for the benefit of the estate, of property sold to himself, for the price of which he charged himself in his account; nor will it make any difference that on a second accounting by him after his resignation, and about the time proceedings were commenced in equity, he was charged with interest on the price of the property so sold; nor that on accounting an order of distribution was made of the amount found in his hands. *Id.*
7. ADMINISTRATOR DE BONIS NON IS PROPER PARTY TO BRING BILL IN EQUITY to compel a former administrator to release property sold to himself. *Id.*
8. NAKED POWER TO EXECUTOR TO SELL LANDS FOR PURPOSE OF PAYING LEGACIES or making distribution does not vest any title to the land in the executor. To cut off the heir at law, the estate must be devised expressly or by implication to another. *Doe d. Clendenning v. Lanius*, 518.
9. LEGAL ESTATE WILL BE DIVESTED MOMENT EXECUTOR EXECUTES POWER to sell lands and distribute proceeds, but until sale is made, the heir is entitled to the possession and profits. *Id.*
10. ADMINISTRATOR'S DEED NEED NOT RECITE AT LENGTH DECREE OR PROCEEDINGS in the suit on which the decree for conveyance was founded. Such recital would not be evidence of their existence, except between the parties and their privies. As against a third party, the judgment or decree authorizing the conveyance must be produced. *Jones v. Taylor*, 48.

11. ORDER OF PROBATE COURT REQUIRING ADMINISTRATOR TO EXECUTE TITLES to all lands for which the estate of the deceased stood bound is not authorized by the statute, and is therefore void, and an administrator's deed which recites such order furnishes intrinsic evidence of its own nullity. *Id.*
12. IF ADMINISTRATRIX WASTES ESTATE, the children, the distributees of the estate, have a right to have so much of her portion of the estate appropriated to their own use as will be sufficient to make good any waste or misapplication of assets which has occurred during her administration, and this in preference to the claim of a complainant, a judgment creditor of the administratrix, who is endeavoring to charge her share with the payment of his debt. *Lang v. Brown*, 244.
13. MONEY PAID TO GUARDIAN MUST BE RETURNED TO ADMINISTRATOR when it is necessary for the payment of debts of deceased. *Wilson v. Soper*, 573.
14. TITLE TO LAND CONVEYED TO ADMINISTRATOR VESTS IN HIM SUB MODO only, and for the purposes of the administration. He takes only temporarily for the benefit of creditors, if any, and of the heirs, and his right determines with the period of administration. *Easterling v. Blythe*, 45.
15. HEIRS MAY SUE FOR WHATEVER REMAINS OF ESTATE after it has been fully administered, and its liabilities to creditors have been extinguished. *Id.*
16. ADMINISTRATION IS PRESUMED TO HAVE TERMINATED at the end of the period fixed by law. *Id.*
17. COURT OF ANCILLARY ADMINISTRATION MAY RETAIN ASSETS OF ESTATE remaining after payment of all debts, and distribute them according to the law of the domicile of the intestate, or it may transmit them to the place of the principal administration, to be there distributed. The power of the court in such matter is a discretionary one, to be exercised according to the circumstances and equity of each case. *Lawrence v. Kitteridge*, 385.
18. WHERE ADMINISTRATOR HAS DISCHARGED DEBT DUE FROM ESTATE of his intestate, he is entitled to have it allowed in the account of his administration. *Id.*

See CONFLICT OF LAWS, 4; GUARDIAN AND WARD, 5, 6; PARTNERSHIP, 13-15, 18; SALES, 1; WILLS, 14-16.

EXEMPLARY DAMAGES.

See DAMAGES, 3.

FACTORS.

1. FACTOR OR COMMISSION MERCHANT IS NOT AUTHORIZED BY LAW TO PLEDGE goods of his principal for his own use. The party receiving such a pledge and advancing his money acquires no title as against the principal; nor is it material in such a case whether the pledgee knew that he was dealing with a factor or not. *Bott v. McCoy*, 223.
2. FACTOR CAN NOT DISAFFIRM HIS OWN TORTIOUS ACT in pledging the goods of his principal; the violation of his authority is injurious to the principal alone, and he may ratify or confirm the act at his pleasure; but the factor is estopped by his act, and can not be allowed to allege his own violation of authority to set aside the transfer or to recover the goods. *Id.*

3. FACTOR PLEDGING GOODS WITHOUT AUTHORITY CAN NOT SUBSEQUENTLY SELL GOODS and enable the vendees to set aside the contract of pledge, where the contract of pledge has not been disaffirmed by the principal; and as between the pledgee and the vendee, the pledgee has the better title. *Id.*
4. PRINCIPAL'S RECEIVING MONEY ARISING FROM SALE of goods by his factor, the factor having previously pledged the goods without authority to the plaintiff, will not be regarded as a confirmation of the sale and as a disaffirmance of the pledge if the principal was ignorant of the source from which the money came at the time he received it. *Id.*

FILIATION.

See PARENT AND CHILD, 4-6.

FORECLOSURE.

See MORTGAGES, 11-16.

FORGERY.

See CRIMINAL LAW, 9, 10, 13, 14.

FORNICATION.

See CRIMINAL LAW, 3, 8, 16-21; EVIDENCE, 12, 13.

FORTHCOMING BONDS.

See WITNESSES, 3.

FRANCHISES.

See CORPORATIONS; TAXATION, 14, 15.

FRAUD.

1. TRESPASS ON CASE IS PROPER REMEDY FOR FRAUDULENT REPRESENTATIONS respecting the soundness of a slave or other personal chattel sold. *Assumpsit* is a concurrent remedy, and the party deceived may elect which method he will proceed under. *Trice v. Cockran*, 151.
2. FRAUD IN OBTAINING RECEIPT OF SUM AS SPECIFIED IN DEED IS DEFENSE to an action for slander of title against the grantor of land, who published a caution against persons purchasing from his grantee, claiming that the title was obtained under fraudulent pretenses. *McDaniel v. Baca*, 339.
3. EVIDENCE OF ACQUIESCENCE IN CONTRACT PROCURED BY FRAUD can not be used by way of estoppel for the purpose of excluding evidence showing that the same was procured by false and fraudulent representations. *Crump v. United States Mining Co.*, 116.
4. FRAUD MAY BE INFERRED FROM STRONG PRESUMPTIVE CIRCUMSTANCES, and express proof is not required; and an instruction that fraud can not be presumed, but must be established by proof, and may be established by circumstances of conclusive but not of light character, is therefore erroneous. *McDaniel v. Baca*, 339.
5. FRAUDULENT INTENT IS MADE QUESTION OF FACT in all cases arising under the California statute of frauds and fraudulent conveyances. *Billings v. Billings*, 319.

6. PRESUMPTION OF FRAUDULENT INTENT MAY BE FOUND AGAINST, and the verdict will not be interfered with, where the evidence of such intent is declared by law to be merely presumptive; but if certain *indicia* are declared to be conclusive evidence of fraud, a verdict against such evidence should in all cases be set aside. *Id.*

See ARBITRATION AND AWARD, 3, 6; EQUITY, 5; JURISDICTION, 1; JURY; NEGOTIABLE INSTRUMENTS, 10; SALES, 13, 14; WILLS, 4.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE OF LAND BY DEFENDANT PENDING ACTION, executed with the collusion of the grantee, to prevent the collection of any judgment in that action, will be set aside, although the grantee paid full consideration. *Rogers v. Evans*, 537.
 2. PURCHASER FROM FRAUDULENT GRANTOR, TO MAKE DEED VALID against the grantor's creditors, must show not only payment of an adequate consideration, but also good faith in the purchase, and no notice of vendor's fraudulent designs. *Id.*
 3. MERE FACT THAT PART OF CONSIDERATION FOR CONVEYANCE OF PROPERTY BY DEBTOR is a contract for his future support does not render it void. *Hapgood v. Fisher*, 663.
 4. CONVEYANCE BY DEBTOR, PART OF CONSIDERATION OF WHICH is a contract by grantee for debtor's future support, is not void if debtor retains sufficient property to pay his debts at the time of the conveyance; if not, it would be void. *Id.*
 5. VOLUNTARY DEED MADE BY MOTHER TO HER CHILDREN, on a consideration of natural love and affection, at a time when she was indebted to the complainant, is void as to him. *Lang v. Brown*, 244.
 6. VOLUNTARY CONVEYANCE WITHOUT CONSIDERATION CAN NOT BE AVOIDED BY GRANTOR'S CREDITORS, who become so subsequent to the record of the deed, by merely proving his insolvency at the time of the conveyance. *Bangor v. Warren*, 657.
 7. WHERE GRANTOR IN DEED FRAUDULENT AS TO CREDITORS DIES IN POSSESSION of the property granted, it is assets in the hands of his administrator, and may be levied upon as such. *Kent v. Lyon*, 404.
 8. WHERE FRAUDULENT DONEE GOES INTO POSSESSION OF PROPERTY in the life-time of the donor, he will not be liable therefor to the donor's representative, but he will be compelled to account therefor to the creditors. *Id.*
 9. FRAUDULENT DEED OF ASSIGNMENT IS CAPABLE OF CONFIRMATION by the creditors; and after such a deed has been executed, and the creditors assenting to its provisions have been paid from the effects assigned, the transaction as to them will not be disturbed. *White v. Banks*, 283.
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUD, 5; SURETYSHIP, 9.

FRAUDULENT REPRESENTATIONS.

See FRAUD, 1-3; VENDOR AND VENDEE, 9, 10.

GAMING.

See PLEADING AND PRACTICE, 4.

GARNISHMENT.

See ATTACHMENTS, 4, 5.

GIFTS.

ANY GIFT OR BEQUEST OF CHATTEL, NO MATTER HOW LONG THE TIME, passed the title at common law; but this rule has been relaxed. *Maulding v. Scott*, 298.

GRANTS.

See CORPORATIONS, 6, 7; DEEDS; PUBLIC LANDS.

GUARANTY.

1. GUARANTOR MAY SPECIFY IN WRITTEN ORDER which he gives the terms upon which he will be bound. *Wadsworth v. Allen*, 137.
2. WHEN GUARANTOR UNDERTAKES TO PAY upon receiving reasonable notice, the latter will be a question for the jury. *Id.*
3. FACT THAT PRINCIPAL GAVE HIS NOTE for goods which he purchased on a written order will not discharge his guarantor's liability. *Id.*
4. MERCANTILE GUARANTIES SHOULD NOT BE SUBJECTED TO STANDARD OF CRITICAL NICETY applied to instruments drawn by professional men. *Menard v. Scudder*, 610.
5. CONTINUING GUARANTY WILL BE IMPLIED from a letter in the following terms: "I do recommend my friend A. B., of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay. C. D." *Id.*
6. IN CONTINUING GUARANTY creditor must not only show that he advanced his money or parted with his goods on the faith of the letter of guaranty, but that he also seasonably notified the guarantor that he accepted the guaranty, and intended to act upon its security. *Id.*
7. EXPRESS AND FORMAL NOTICE, EMANATING DIRECTLY FROM CREDITOR TO GUARANTOR, is not indispensable to bind the latter in continuing guaranty. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it will be sufficient. *Id.*
8. DEATH OF GUARANTOR, WITHOUT NOTICE TO OR KNOWLEDGE BY CREDITOR, will not defeat the latter's indemnity for advances made in good faith after that event. *Id.*
9. GUARANTOR IS TERM APPLIED TO ONE WHO PUTS HIS NAME ON BACK OF PROMISSORY NOTE out of the course of regular negotiability, and this is so whether his inscription is simply in blank or preceded by the words "I guarantee," etc.; such person is not an indorser according to strict commercial meaning. *Riggs v. Waldo*, 356.
10. GUARANTY OF PROMISSORY NOTE IS NOT WITHIN STATUTE OF FRAUDS for want of an expressed consideration in writing; a consideration is imported because the contract is a promissory note; and each one who writes his name upon the note is an original undertaker. *Id.*
11. UNDERTAKING OF GUARANTOR OF PROMISSORY NOTE IS ATTENDED WITH ALL RIGHTS AND LIABILITIES OF INDORSER *stricti juris*; and in order to charge him, therefore, presentment of the note must be made to the maker at maturity, and due notice of non-payment given. *Id.*

GUARDIAN AND WARD.

1. NOTICE IS NECESSARY BEFORE APPOINTMENT OF GUARDIANS FOR INSANE PERSON, and if the proceedings are *ex parte*, they are null and void. *Eslava v. Lepretre*, 266.
2. APPOINTMENT BY COUNTY COURT OF GUARDIAN FOR LUNATIC WIFE, upon the petition of the husband, without notice to her, and without the issue of a writ *de lunatico inquirendo* and the verdict of a jury thereon, is *coram non judice* and void. *Id.*
3. GUARDIANS OF LUNATIC WIFE HAVE NO AUTHORITY TO RELINQUISH HER DOWER in the real estate of her husband. *Id.*
4. ORDER OF PROBATE COURT TO GUARDIAN OF INFANT HEIRS OF DECEASED PARTNER to expend his ward's property, without limiting the amount, in the completion of their part of an unfinished distillery, authorizes, a reasonably prudent expenditure of the requisite sum for that purpose. *Powell v. North*, 513.
5. ADMINISTRATOR HOLDING PROPERTY OF DECEDENT'S INFANT HEIRS, whose guardian has been authorized by court to make a reasonable and prudent expenditure of such property for a certain purpose, and has directed the administrator to so expend the same, should receive credit in his settlement for the money which he expends for that purpose with reasonable care and judgment. *Id.*
6. SURETIES UPON BOND OF GUARDIAN ARE RESPONSIBLE TO ADMINISTRATOR for money which, if paid to the wards, would have to be returned by them to the administrator to pay debts of the deceased. The liability of the sureties is not increased by making them thus directly responsible to the administrator, who, for the benefit of creditors, is entitled to an equitable substitution to the right of the wards in money in the hands of the guardian. *Wilson v. Soper*, 573.

See EXECUTORS AND ADMINISTRATORS, 13.

HEIRS.

See EXECUTORS AND ADMINISTRATORS, 15; "SHELLEY'S CASE;" WILLS, 7, 8, 10, 11.

HIGHWAYS.

1. ROAD CAN NOT BE CHANGED EXCEPT BY COMPETENT AUTHORITY; and where a grantor bounds a tract conveyed to the plaintiff on a road running through the remaining part of his land, and the road as established before that time was contiguous, neither the grantor nor a subsequent devisee of the remaining part can alter the location. *Cole v. Sprowl*, 696.
2. PURPOSES FOR WHICH ROAD IS TO BE USED IS QUESTION OF FACT for the jury, on the conveyance of a tract of land bounded on a road leading through the remaining part of the grantor's land, and it is not error to refuse an instruction that the word "road" denotes only a right of way over the grantor's other lands for the same purposes for which it was used by the grantor at the time of the conveyance. *Id.*
3. DAMAGES FOR OBSTRUCTING HIGHWAY and the lights and doors of plaintiff's house, by erecting a building in the highway, are recoverable to the date of the writ only, and not to the time of the trial. *Id.*

4. FEE OF LAND INCLUDED IN STREET REMAINS IN ORIGINAL OWNER, and the public, by establishing the highway, merely acquire a right of way over it, with the incidental right of repairing it in a reasonable manner. *Nicholson v. New York etc. R. R. Co.*, 390.
5. WHERE CHARTER OF RAILROAD COMPANY EXPRESSLY AUTHORIZES IT TO CONSTRUCT ITS ROAD across a street, and imposes on it the burden of restoring the street to its former state, or in sufficient manner not to impair its usefulness, the company is not compelled to pay damages to a person who owns a lot lying adjacent to its track, unless it has done some injury to his property in performing the work. *Id.*
6. OWNER OF LAND USED AS STREET MAY MAINTAIN TRESPASS against a railroad company for injury caused to his property by the company's entering upon it and depositing materials thereon. So far as the company is justified in entering, in consequence of there being a highway there, it is not guilty of anything, but if it goes beyond its justification, then it is guilty of a direct trespass. If its justification fails, it is in the same condition as if it had entered upon a separate inclosure not subject to any public easement. *Id.*
7. PRIVATE PERSON CAN RECOVER FOR OBSTRUCTION TO PUBLIC WAY, although it might also be a public nuisance, where the obstruction would constitute an invasion of his rights, causing special damage to him, not common to others, for which an action would lie. *Cole v. Sprowl*, 696.

See DEDICATION; EMINENT DOMAIN.

HUSBAND AND WIFE.

1. DOMICILE OF HUSBAND DETERMINES DOMICILE OF WIFE, and the removal of the wife from the state where the husband is domiciled does not operate to change her domicile, although she is induced to leave him by his harsh treatment. *Harrison v. Harrison*, 227.
2. ONUS TO SHOW HUSBAND'S LIABILITY FOR NECESSARIES SUPPLIED TO WIFE LIVING APART from him rests on the party supplying them. *Mitchell v. Treanor*, 421.
3. HUSBAND IS LIABLE FOR NECESSARIES SUPPLIED TO WIFE CONSTRAINED TO LIVE APART from him by his mistreatment of her. *Id.*
4. HUSBAND IS NOT RELIEVED OF LIABILITY FOR WIFE'S NECESSARIES BY SUBSEQUENT PROVISION made for her by a decree for past alimony, where the necessities were previously furnished. *Id.*
5. HUSBAND IS NOT LIABLE FOR WIFE'S NECESSARIES FURNISHED ON HER CREDIT, and not on that of her husband, even if she is living with him, much less if she is living apart. *Id.*
6. WHETHER WIFE'S NECESSARIES WERE SUPPLIED ON HER CREDIT or that of her husband, is a question for the jury. *Id.*
7. PRESUMPTION THAT PROPERTY PURCHASED DURING MARRIAGE IS COMMUNITY PROPERTY is very cogent, and can only be repelled by clear and conclusive proof; but where it is established clearly and conclusively that the property was purchased with the separate money of one of the parties, it remains the separate property of the party with whose money it was purchased. *Love v. Robertson*, 41.
8. PROPERTY PURCHASED WITH PROCEEDS OF HUSBAND'S PATRIMONY remains his separate property. *Id.*

9. PROPERTY WHICH IS PARTLY COMMUNITY AND PARTLY SEPARATE PROPERTY of a deceased husband should be directed to be sold if found necessary to a proper distribution of the respective interests of the widow and the heir. *Id.*
10. RIGHT OF HUSBAND TO PROPERTY OF HIS INTENDED WIFE may be relinquished by his agreement to that effect, and where there is an express contract made to that effect, the wife is to all intents a *feme sole* in respect to her property. *Charles v. Charles*, 155.
11. HUSBAND HAS NO RIGHT TO ADMINISTER UPON HIS WIFE'S PROPERTY when he has relinquished his right to her property previously to marriage. *Id.*
12. RIGHTS OF HUSBAND AND WIFE IN IMMOVABLE PROPERTY BELONGING TO EITHER is governed by the law of the place where it is situated. *New-comer v. Orem*, 717.
13. RENTS AND INCOME OF REAL ESTATE BEQUEATHED TO WOMAN, WHO AFTERWARDS MARRIES and dies childless, will upon her death go to her brothers and sisters in preference to her husband. *Id.*
See DOWER; GUARDIAN AND WARD, 2, 3.

IGNORANTIA LEGIS.

See MISTAKE, 1-4.

ILLEGITIMATE CHILDREN.

See PARENT AND CHILD.

IMPEACHMENT OF WITNESSES.

See WITNESSES, 5, 6.

INCEST.

See CRIMINAL LAW, 3, 7.

INDICTMENT.

See CRIMINAL LAW, 4-12.

INDORSEMENTS.

See GUARANTY, 9, 11; NEGOTIABLE INSTRUMENTS, 5-7, 12-21.

INFANCY.

INFANT BAILEE IS LIABLE FOR CONVERSION when he departs from the object of the bailment, although so long as he keeps within its terms his infancy is a protection. *Towne v. Wiley*, 85.

See GUARDIAN AND WARD, 4-6.

INJUNCTIONS.

1. INJUNCTION CAN ONLY BE ISSUED UNDER REFORMED PROCEDURE where the complaint makes out a case of equity jurisdiction; the rules and principles of equity practice remain unaltered, although there is no separate forum for the adjudication of chancery cases. *Minturn v. Hays*, 366.

2. ALLEGATION OF IRREPARABLE INJURY IS INSUFFICIENT FOR EQUITABLE INTERPOSITION by way of injunction; it must appear from the facts set forth in the bill. *De Witt v. Hays*, 352.
3. ABUSE OF WRIT OF INJUNCTION SHOULD BE CHECKED. *Id.*

INSANITY.

See MORTGAGES, 13; WILLS, 1-3, 5, 6.

INSTRUCTIONS.

See NEW TRIAL, 5; PLEADING AND PRACTICE, 15, 24.

INSURANCE—LIFE.

1. POWER OF ASSIGNMENT OF LIFE INSURANCE POLICY IS NOT LIMITED by a provision to pay the sum secured to the "legal representatives" of the insured, but the provision is designed to apply only in case the latter had died without having previously assigned, where the contract was with the "assured, his executors, administrators, and assigns," and at the bottom of the policy were the words "N. B. If assigned, notice to be given the company." *New York Life Ins. Co. v. Flack*, 742.
2. REASONS REQUIRING UNDERWRITERS' ASSENT TO MAKE ASSIGNMENTS OF FIRE POLICIES VALID DO NOT OBTAIN in case of an insurance on human life. *Id.*
3. NOTICE OF ASSIGNMENT OF INSURANCE POLICY IS SUFFICIENTLY EARLY when given two days subsequent to the assignment, although after the death of the assured, if the policy does not specify any particular time within which notice is to be given. *Id.*
4. DELIVERY OF ASSIGNMENT OF INSURANCE POLICY IS SUFFICIENT TO VEST TITLE IN ASSIGNEE, and is good against all but the creditors of the assignor, when made by the assignor to the representative of the assignee. *Id.*
5. ASSIGNMENTS OF INSURANCE POLICIES ARE AUTHORIZED by the Maryland act of 1829, chapter 51, policies being but choses in action for the payment of money, and all contracts for the payment of money, whether express or implied, being within the purview of that act. *Id.*

INSURANCE—MARINE.

1. WHEN VESSEL SEAWORTHY AT COMMENCEMENT OF VOYAGE becomes unseaworthy during the same, the owner is bound to repair the damage at the port of refuge, refreshment, or trade to entitle him to recover risk. *McDowell v. General Mut. Ins. Co.*, 619.
2. UNSEAWORTHINESS ARISING AFTER COMMENCEMENT OF VOYAGE shall not operate as a defense, except where the loss has been occasioned by it, and resulted from negligence or misconduct of the assured or his agent. *Id.*
3. PRESUMPTION OF UNSEAWORTHINESS ARISES when a vessel springs a leak soon after the risk commences, without any apparent cause, from perils within the policy. *Rugely v. Sun Mutual Ins. Co.*, 603.
4. UNDERWRITERS' LIABILITY CEASES UPON FAILURE TO EMPLOY PILOT on part of owner or his agents, where a pilot's services are necessary to avoid danger. *McDowell v. General Mut. Ins. Co.*, 619.

5. UNDERWRITERS ARE NOT LIABLE FOR LOSS OF STRANDED VESSEL when the loss could have been avoided by care and diligence on part of owner or his agent. *Id.*
6. ASSURED CAN RECOVER PARTIAL LOSS OF CARGO disposed of by master, by reason of shipwreck, when the same could be reshipped or forwarded to its destination. *Rugeley v. Sun Mutual Ins. Co.*, 603.

INTEREST.

MONEY DEMANDS DRAW INTEREST AFTER MATURITY AT RATE EXPRESSED IN WRITTEN CONTRACT, notwithstanding nothing is expressly said about interest after maturity; and it is only where no rate is agreed upon that the statute takes effect. *Kohler v. Smith*, 369.

See CONFLICT OF LAWS, 1, 2; CONTRACTS, 2; JUDGMENTS, 16, 17; MORTGAGES, 5-8.

INTOXICATION.

See JUDGMENTS, 13.

JUDGMENTS.

1. JUDGMENT IS NOT SUCH CONTRACT AS IS CONTEMPLATED BY UNITED STATES CONSTITUTION in that clause which provides that no law shall be passed impairing the obligation of contracts. Consequently, where a judgment is rendered prior to the passage of the valuation law, and the execution is taken out under this law, it must be followed or the sale is void. *Sprott v. Reid*, 549.
2. FINAL DECREE, AFTER DECREE PRO CONFESSO, MAY BE RENDERED WITHOUT PROOF, where the bill is against adult residents of the state who are personally served with notice, and the allegations of the bill are certain, especially if the subject-matters of those allegations are of a definite and certain nature. *Colerick v. Hooper*, 505.
3. DECREE GRANTING MORE EXTENSIVE RELIEF THAN IS PRAYED FOR by the bill or justified by its allegations, and the proof taken under it, is erroneous; therefore, where a bill against the administratrix and distributees of an estate prays a settlement of the estate, an ascertainment of the share of the administratrix, and that this share may be charged with the payment of a debt due complainant, and also that a voluntary deed from the administratrix to the distributees, her children, may be set aside, it is error for the chancellor to direct the defendants generally to pay into court within thirty days the sum reported by a master, to whom the account has been referred, to be due the complainant on his judgment, and in default thereof to direct executions to issue. *Lang v. Brown*, 244.
4. ORDER OR DECREE FINALLY SETTTLING ANY DISPUTED RIGHT OR INTEREST IS FINAL DECREE, it would seem, and as such would warrant an appeal. *Ware v. Richardson*, 762.
5. DECREES FOR SALE OF REAL ESTATE ARE ENUMERATED AMONG THOSE NOT REGARDED AS FINAL, by the Maryland act of 1830; but the act was not intended to embrace a case where the liability of the property sold was the only question to be determined by the court. *Id.*

6. DECREE CAN NOT BE TREATED AS SO FAR FINAL AND CONCLUSIVE as to preclude an appeal on a question where such question was reserved for some future decree of the court. *Id.*
7. NO JUDGMENT CAN BE AMENDED OR ENTERED NUNC PRO TUNC unless amendment or entry be authorized by matter of record, or some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at least by some book belonging to the office of the court, and required to be kept there by law. *Hudson v. Hudson*, 200.
8. DECREE OF FINAL SETTLEMENT NUNC PRO TUNC IS NOT AUTHORIZED by a paper purporting to be a final decree, and signed by the probate judge, and found amongst the filed papers in the cause, where the record does not show that this paper was ever made a part of the record by the act of the court. *Id.*
9. JUDGMENT FOR COSTS IN PARTITION PROCEEDING is a valid and subsisting judgment, and will support an execution sale. That the parties had sixty days within which to pay said costs before execution issued, does not make the judgment conditional. *Sprott v. Reid*, 549.
10. JUDGMENT IS CONCLUSIVE EVIDENCE THAT IT WAS DUE to its full amount when recovered. *Bird v. Smith*, 635.
11. EVIDENCE OF FACTS THAT EXISTED BEFORE RENDITION OF JUDGMENT is not admissible to show that the amount of the judgment is not all due. *Id.*
12. JUDGMENT CONCLUDES ALL MATTERS WHICH MIGHT HAVE BEEN URGED BEFORE ADJUDICATION, as to the principal parties and privies in interest or estate, and among them is included bail. *Parkhurst v. Sumner*, 94.
13. JUDGMENT CONCLUDES BOTH AS TO PRINCIPAL AND BAIL SUBJECT-MATTER OF PLEA that the original plaintiff was induced to consent to the judgment for costs against him when in a state of intoxication produced by the defendant in the suit, the present plaintiff. *Id.*
14. JUDGMENT FOR COSTS DOES NOT CONCLUDE BAIL, when entered up in the principal action by collusion between the original parties, with a view to defraud the bail, and the bail may plead the collusion at the earliest opportunity afforded him in a suit upon his recognizance. *Id.*
15. PLEA OF COLLUSIVE JUDGMENT IN PRINCIPAL ACTION TO DEFRAUD BAIL IS BAD IN FORM, in a suit upon a recognizance, unless it alleges that the judgment was finally rendered in pursuance of the alleged corrupt agreement, and by the collusion of the principal of the bail. *Id.*
16. JUDGMENTS AT COMMON LAW CARRIED NO INTEREST. *Thompson v. Monrow*, 318.
17. INTEREST ON JUDGMENT OF ANOTHER STATE SHOULD NOT BE ALLOWED where there is no evidence showing that the common law of such state has been altered by statute. *Id.*
18. PARTY PAYING JUDGMENT AGAINST HIMSELF BEFORE EXECUTION ISSUED does not thereby waive his right of testing its validity in the appellate court. *Richeson v. Ryan*, 493.
19. MERE PROPOSITION TO ACCEPT LESS THAN FULL AMOUNT OF JUDGMENT in full discharge thereof, if unaccepted by the judgment debtor, will have no effect upon the recovery of the full amount of the judgment. *Bird v. Smith*, 635.

20. PART PAYMENT OF DEBT UPON WHICH JUDGMENT HAS BEEN RECOVERED, made prior to rendition of judgment, is no defense to an action on a check given in satisfaction of the judgment, whether the payment was made to the nominal plaintiff or to one having an equitable interest in the judgment. *Id.*
 21. WHERE, BY REASON OF MISTAKEN OR FRUITLESS LEVY ON LAND, the debt has not in fact been satisfied, either debt on the judgment or *scire facias* may be brought to obtain satisfaction, notwithstanding the apparent satisfaction of the execution. *Cowles v. Bacon*, 371.
 22. DEFENDANT IN ACTION ON JUDGMENT MAY GIVE EVIDENCE to show that a conveyance by him of land previously levied on under the judgment was fraudulent as to the judgment creditor, for the purpose of proving that the judgment sued on has been satisfied by the levy. *Id.*
 23. EQUITY HAS NO JURISDICTION TO RELIEVE AGAINST JUDGMENT to which complainant failed to make a legal defense when he might have done so. *Casey v. Gregory*, 581.
 24. PETITION IN EQUITY TO HAVE JUDGMENT SET ASIDE FOR LACK OF NOTICE TO DEFENDANT, and the unauthorized appearance of an attorney for him, must state that the sum for which the judgment was rendered was not due to the plaintiff, or that it operated oppressively to defendant, and that he had a good defense at law. *Piggott v. Addicks*, 547.
 25. PETITION IN EQUITY TO HAVE JUDGMENT AT LAW SET ASIDE MUST SHOW that the petitioner has resorted to his legal remedy; viz., a motion to set aside the judgment in the court in which it was rendered. *Id.*
- See ATTORNEY AND CLIENT, 3-8; CONFLICT OF LAWS, 1; EQUITY, 7, 8; EXECUTIONS, 1, 9; LIENS, 5; PARTNERSHIP, 18; PLEADING AND PRACTICE, 27, 30, 35, 36; SHERIFFS, 3; VENDOR AND VENDEE, 6.

JUDICIAL KNOWLEDGE.

See CONFLICT OF LAWS.

JUDICIAL SALES.

- IN MARYLAND, TRANSMUTATION FROM REALTY TO PERSONALTY, under a commissioners' sale, is complete when the sale is ratified and the purchaser has complied with the terms of it. *Newcomer v. Orem*, 717.

See EXECUTIONS, 6, 14-30.

JURISDICTION.

1. JURISDICTION OF COURTS CAN NOT BE DIVESTED BY AGREEMENTS OF PARTIES, and where parties have stipulated not to appeal, courts of equity may interfere, in the absence of statutes, to correct fraud or mistake appearing on the face of the record. *Muldrow v. Norris*, 313.
 2. WHERE COURT HAS JURISDICTION OF SUBJECT-MATTER, AND PARTY IS PRIVILEGED from its jurisdiction, he may waive such privilege, and a pleading to the merits, or submitting to answer without raising the objection to the jurisdiction on account of such privilege, is a waiver of the objection. *Harrison v. Harrison*, 227.
 3. PROCEEDINGS OF COURT MAY BE IMPEACHED COLLATERALLY when they are void for want of the jurisdiction of the court. *Eslava v. Lepretre*, 266.
- See EQUITY; JUDGMENTS, 23; PARENT AND CHILD, 8; TAXATION, 2-4, 9, 11.

JURY.

GOOD FAITH OF TRANSACTION IS MATTER PECULIARLY APPROPRIATE for the consideration of the jury. *Jennings v. Gage*, 476.

See CONSTITUTIONAL LAW, 6; HIGHWAYS, 2; NEW TRIAL, 1.

JUSTICES OF THE PEACE.

See PROCESS, 3-5.

LABORERS.

See LIENS, 7, 9, 10.

LANDLORD AND TENANT.

1. CONTRACT BY WHICH OWNER LETS LAND AND IS TO RECEIVE PORTION OF PRODUCTS in payment and satisfaction of the rent is a letting of the land on shares, and the parties to the agreement are tenants in common of the products to be grown and divided between them. *Smyth v. Tankersley*, 193.
2. DESTRUCTION OF BUILDING BY FIRE DESTROYS INTEREST OF LESSEE OF ONE ROOM therein, and a re-entry by the owner of the building for the purpose of rebuilding is no eviction of such lessee so as to defeat an action for rent. *Alexander v. Dorsey*, 443.
3. NOTICE TO QUIT IS UNNECESSARY where the relation of landlord and tenant does not exist. *Kilburn v. Ritchie*, 326.
4. IMPROVEMENTS CAN NOT BE SET OFF AGAINST DAMAGES FOR USE AND OCCUPATION where the defendant entered under a bond for a deed from the plaintiff. *Id.*
5. IN ACTION OF COVENANT FOR FAILURE BY LESSOR TO DELIVER to the lessee possession of premises rented by the latter; and where the latter has not sustained any special damage, the lessee is entitled only to general damages, and the measure of such damages is the difference between the rent contracted to be paid and a fair rent for the property at the time when it should have been delivered up. *Newbrough v. Walker*, 126.

See EXECUTIONS, 16-17.

"LAW OF THE LAND."

See CONSTITUTIONAL LAW, 7.

LEASES.

See EXECUTIONS, 16; LANDLORD AND TENANT.

LEGACIES.

See WILLS.

LEGISLATIVE DIVORCES.

See CONSTITUTIONAL LAW, 9-11; MARRIAGE AND DIVORCE, 4.

LEGISLATURE.

See CONSTITUTIONAL LAW, 1-3, 5, 9-11; CORPORATIONS, 1-10; TAXATION, 1, 8.

LEGITIMACY.

See PARENT AND CHILD.

LETTERS OF CREDIT.

See EVIDENCE, 7.

LEVY.

See ATTACHMENTS, 6; EXECUTIONS, 8-13.

LICENSE.

1. LICENSE IS RIGHT TO DO PARTICULAR ACT or series of acts without any interest in the land. *Riddle v. Brown*, 202.
2. LICENSE TO DIG ORE IN ANOTHER'S LAND will exempt a party from an action of trespass for entering the land of another to dig ore, and will give him the property in the ore which is actually dug under it, but such a license is revocable at any time, at the pleasure of him who gives it, and is not assignable. *Id.*
3. ONE WHO DIGS ORE ON ANOTHER'S LAND BECOMES TRESPASSER if, after the license is revoked, he attempts to enter, although he supposed he was maintaining his lawful right, and the owner will be justified in repelling him. *Id.*

See PLEADING AND PRACTICE, 4.

LIENS.

1. LIEN UPON PERSONALTY AT COMMON LAW IS FOUNDED ON POSSESSION, actual or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged. It involves the right to an uninterrupted possession while it exists, and is lost or waived when possession is voluntarily surrendered. *Miller v. Marston*, 694.
2. STABLE-KEEPER HAS NO LIEN UPON HORSE FOR ITS KEEPING, or for doctoring the horse, where the service was rendered in the usual course of keeping and without any special contract therefor. *Id.*
3. PARTICULAR LIEN FOR KEEPING MUST BE RESTRICTED TO THING KEPT; it is a claim *in rem* which the keeper can not extend to other property; consequently a lien for the keeping of a mare can not be extended to a sleigh, harness, and robes in the keeper's possession. *Id.*
4. LIEN CREATED BY STATUTE FOR PAYMENT OF DEBT IS BUT PART OF REMEDY afforded by the law for its collection; and a change of that remedy does not affect the obligation of the contract. *Bangor v. Goding*, 688.
5. LIEN IS WAIVED BY INCLUDING IN JUDGMENT ON LIEN CLAIM a claim to which no lien is attached. *McCrillis v. Wilson*, 655.
6. LIEN GIVEN BY STATUTE FOR AMOUNT DUE FOR PERSONAL SERVICES does not extend to amount due for hire of oxen and sled employed on the same work. *Id.*
7. LIEN FOR PERSONAL SERVICES EXTENDS TO TIME during which the employee is detained by the employer after the work is finished, in anticipation of possible need of his services. *Id.*
8. OFFICER IS RESPONSIBLE FOR SALES OF PROPERTY upon which lien has been waived, and which is therefore not liable to such sale. *Id.*

9. STATUTORY LIEN ON LUMBER TO LABORERS THEREON FOR AMOUNT STIPULATED TO BE PAID for their personal services, and actually due, will attach, it seems, to lumber labored upon by one in connection with other workmen, though it can not be proved that he or the particular crew of workmen with which he worked labored on the identical lumber sought to be subjected to the lien. *Id.*
 10. MECHANIC'S LIEN LAW PROVIDES EXCLUSIVELY FOR SECURITY OF MATERIALMEN AND LABORERS, and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can claim no benefit of the law. *Godeffroy v. Caldwell*, 360.
- See ATTORNEY AND CLIENT, 3-8; EXECUTIONS, 26; PARTNERSHIP, 17; STATUTES, 5; VENDOR AND VENDEE, 3-6.

LOST INSTRUMENTS.

See EVIDENCE, 8, 9.

LUNATICS.

See GUARDIAN AND WARD, 1-3.

MALICE.

See SLANDER OF TITLE.

MALICIOUS ATTACHMENT.

See ATTACHMENTS, 7-10.

MARINE INSURANCE.

See INSURANCE—MARINE.

MARINE PROTEST.

See EVIDENCE, 4.

MARRIAGE AND DIVORCE.

1. DEFENDANT'S ADMISSIONS ARE COMPETENT EVIDENCE OF MARRIAGE and of relationship to the female *particeps criminis*, under an indictment for incestuous adultery. *Cook v. State*, 410.
2. PRESUMPTION OF ACTUAL MARRIAGE FROM COHABITATION IS REBUTTED by the fact of a subsequent permanent separation without any apparent cause, and the marriage in solemn form of one of the parties which took place shortly after the separation. *Weatherford v. Weatherford*, 206.
3. ONE STATE CAN NOT ANNUL MARRIAGE OF PARTIES DOMICILED in another state; its sentence would be utterly void, and no consent can in such a case confer jurisdiction. *Harrison v. Harrison*, 227.
4. LEGISLATIVE ACT DIVORCING PARTIES RESTORES TO WIFE the real estate of which she was seised at the time of the marriage, and which had not been conveyed away during coverture by the joint act of herself and husband. *Wright v. Wright's Lessee*, 723.
5. SUBSEQUENT DECREE OF DIVORCE DOES NOT VACATE PREVIOUS DECREE FOR ALIMONY due anterior to its rendition. *Harrison v. Harrison*, 227.

6. PROVISION FOR ALIMONY TERMINATES ON DIVORCE being granted to the husband, although the decree for alimony did not fix upon that as a period terminating the provision made by its decree for the wife. *Id.*
7. CONDONATION IS ACCOMPANIED WITH IMPLIED CONDITION, that injury shall not be repeated, and a repetition of the injury takes away the condonation and operates a revivor of the former acts. *Id.*
8. WIFE MAY MAINTAIN BILL FOR ALIMONY IN ANOTHER STATE than that in which the parties have their domicile, where the wife is a resident of that state, and has been driven to a residence there by the husband's cruel treatment of her, if the court obtain jurisdiction of the husband; the question of legal domicile would interpose no obstacle in such a case, for when it is necessary to the protection of the wife against the actual or threatened injury of the husband, the law, and much more equity, will pretermitt the legal fiction of their unity. *Id.*

See AFFINITY; CONSTITUTIONAL LAW, 9-11.

MARRIED WOMEN.

1. DEED CREATES MERE EQUITABLE LIFE ESTATE IN MARRIED WOMAN, and executes legal estate in her heirs, where it conveys real estate to a trustee in trust that she "may, during her life, have, hold, use, occupy, possess, and enjoy" the same, "and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble, or control" of her husband, or liability for his debts, "as fully in every respect as if she was sole and unmarried, and from and immediately after her death then to and for the use and benefit of her legal heirs and representatives." *Ware v. Richardson*, 762.
2. GRANTOR'S INTENTION IS TO PREVAIL IN TRUSTS FOR USE OF MARRIED WOMEN, but with the qualification that it must not contravene or defeat the established rules of construction. *Id.*
3. LEGAL ESTATE WILL NOT VEST IN TRUSTEE IN CASE OF TRUST FOR USE OF MARRIED WOMAN unless the instrument creating the trust assigns to the trustee the performance of some duty necessary for her enjoyment of the estate. *Id.*
4. MEDIUM OF TRUSTEE IS NECESSARY TO INVEST MARRIED WOMAN WITH SOLE AND INDEPENDENT POWERS, since her rights and powers are ordinarily vested in her husband; and where bequests or conveyances are made to a married woman for her separate use, without the nomination of trustees, her husband is considered in equity as trustee for his wife. *Id.*
5. SEPARATE ESTATE IN REAL PROPERTY CAN NOT BE ENJOYED BY MARRIED WOMAN unless through the interposition of a trustee, which circumstance of itself would imply the performance of some active duties on his part. *Id.*
6. HUSBAND ACQUIRES CONTROL OVER PROPERTY BY EXECUTING USE IN WIFE in general, and this result is assigned as a reason why a different construction should be given to the instrument than in other cases, in order to effectuate the intention of the grantor. *Id.*
7. INSTRUMENT WILL BE SO CONSTRUED AS TO VEST LEGAL ESTATE IN TRUSTEES if possible, where an estate is devised or conveyed to trustees for the separate use of a married woman, because such a construction will best effectuate the intention of the donor. *Id.*

8. SAME MODE OF CONSTRUCTION IS ADOPTED IN CASES OF DEEDS AS IN DEVICES, where property is given to the use of married women. *Id.*
9. SUITABLE PROVISION FOR MAINTENANCE OF WIFE AND CHILDREN WILL BE REQUIRED to be made out of the wife's personal property by a court of equity, where its intervention is asked by the husband or his assignee to obtain possession thereof; and if the fund be under the control of the court, the wife may proceed by original bill. *Wiles v. Wiles*, 733.
10. WIFE'S EQUITY DOES NOT ATTACH UPON HER LEGAL CHOSES IN ACTION, the aid of a court of equity not being required to enable her husband or his assignee to reduce them into possession; and the collection thereof by the latter will not be restrained until a suitable provision shall be made for the wife. *Id.*

See DOWER; HUSBAND AND WIFE; MORTGAGES, 13-15.

MASTER AND SERVANT.

1. PERSON WHO PERFORMS HIS SERVICES FAITHFULLY AND WITH COMPETENT SKILL is not, as a matter of law, entitled to less-compensation than another of more learning and skill who could perform the same services no better. *Stockbridge v. Crooker*, 662.
2. JURORS MAY CONSIDER, IN AWARDING COMPENSATION FOR SERVICE, exhausting studies, time consumed, and expenses incurred in acquiring great professional knowledge and distinction, or great mechanical or other skill; but they are not bound to award a sum commensurate with the skill exhibited and the responsibility incurred, and an instruction to the latter effect is erroneous. *Id.*
3. WHERE ENTIRE SERVICE IS TO BE PERFORMED for an entire compensation, to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation. *Miller v. Goddard*, 638.
4. ONE CONTRACTING TO LABOR FOR SPECIFIED TIME AT AGREED PRICE per month may recover all the damages he has sustained by the breach of the contract if the employer discharges him without justifiable cause before the expiration of the specified time; but if the employee has departed from the contract without justifiable cause, he can recover nothing. *Id.*
5. ACTION FOR SERVICES ACTUALLY PERFORMED CAN NOT BE MAINTAINED by one who voluntarily abandons the work before its completion, where he has agreed to labor for a certain period at such a price, or to perform certain services for such an amount. *Hutchinson v. Wetmore*, 337.
6. CONTRACT IS ENTIRE, AND VALUE OF PART OF SERVICES PERFORMED CAN NOT BE RECOVERED by an employee who abandons the contract before its expiration without the employer's fault, where the employee agreed to labor for eight months, at a certain rate per month for himself and for his wife, the employer to give his note at the end of four months, payable at the expiration of the term of service, and until which time the wages of the last four months were not to be paid. *Id.*
7. COMPENSATION FOR LABOR ACTUALLY PERFORMED MAY BE RECOVERED by one who had contracted to work for a stipulated time, but who left the employment before its expiration in consequence of rudeness in deportment towards her of a member of another family residing in the same house, although the employer had no control over such family, and the two families were as distinct as they well could be and reside in the same house. *Patterson v. Gage*, 96.

8. PROPRIETORS OF DRUG STORE ARE ANSWERABLE FOR ACT OF THEIR CLERK, whether done through ignorance or by design, and whether with or without their knowledge, whereby he intermixes a poisonous drug in compounding a prescription for a customer, whereby the latter suffers injury. *Fleet v. Hollenkemp*, 563.

See CORPORATIONS, 16-20; DRUGGISTS.

MASTER IN CHANCERY.

See EQUITY, 18, 19; MORTGAGES, 10.

MECHANICS' LIENS.

See LIENS, 10.

MINES.

1. MINES ARE PART OF FREEHOLD, and *prima facie* the owner of the freehold has a right to the mines and the minerals underneath; but this is only a presumption of law that may be rebutted by showing a distinct title to the surface in one, and to that which is underneath in another. *Riddle v. Brown*, 202.
2. THERE MAY BE RIGHT TO DIG ORE IN MINES OF ANOTHER as distinct from the ownership of the mines as that may be from the ownership of the surface. *Id.*
3. RIGHT TO DIG ORE IN MINES OF ANOTHER, if it be to one and his heirs, is an incorporeal hereditament. *Id.*
4. SALE OF RIGHT TO DIG ORE IN LANDS MUST BE IN WRITING in order to be binding. *Id.*

See LICENSE, 2, 3; TRESPASS, 3.

MISDEMEANOR.

See CRIMINAL LAW, 12.

MISNOMER.

See NAMES.

MISTAKE.

1. EVERY ONE IS PRESUMED TO KNOW THE LAW. The maxim, *Ignorantia juris non excusat*, is applicable to civil as well as criminal jurisprudence, and recognized in equity as well as at law; and a departure from it, under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired. *State v. Paup*, 303.
2. IF TWO PARTIES ENTER INTO CONTRACT UNDER MISTAKE OF LAW, equity will relieve upon the ground of surprise; and if one party is mistaken as to the law, and the other, with knowledge, contracts with him, it will relieve upon the ground of fraud. *Id.*
3. COURTS HAVE TRIED TO UPHOLD MAXIM THAT IGNORANCE OF LAW shall not excuse, but in cases of peculiar hardship they have distinguished between ignorance of the existence of a law and of its legal effect. *Id.*
4. PARTIES WHO ENTER INTO CONTRACT UNDER MUTUAL MISTAKE as to the legal effect of a law will be relieved in a court of equity. *Id.*

5. MISTAKE WILL NOT BE CORRECTED IN EQUITY where the parties to an instrument have equal knowledge, or equal means of obtaining knowledge, of the mistake, and there has been no concealment, surprise, or imposition. *Belt v. Mehen*, 329.
 6. MISTAKE WILL NOT BE CORRECTED IN EQUITY where it arises from the laches of the plaintiff and the ignorance of the defendant; the means of information being equally open to both parties. *Id.*
- See ARBITRATION AND AWARD, 3, 4, 6; COMMON CARRIERS, 23; CORPORATIONS, 24; EQUITY, 5; JURISDICTION, 1; MORTGAGES, 9; PLEADING AND PRACTICE, 18; VENDOR AND VENDEE, 7, 8.

MOBS.

See CORPORATIONS, 25.

MORTGAGES.

1. MORTGAGE NOTES ARE DEEMED PRINCIPAL and the land is merely accessory thereto. *Buck v. Swazey*, 681.
2. PRIORITY IS TAKEN OVER MORTGAGE BY CLAIM FOR MONEY ADVANCED for the erection of a building on the mortgaged premises, where the holder of the mortgage invites the expenditure and asserts that the person advancing the money shall be protected. *Godefroy v. Caldwell*, 360.
3. ASSIGNEE OF MORTGAGE TAKES SUBJECT TO ADVERSE CLAIM, where he has full notice of the claim before assignment; and the designation of the claim by an improper term makes no difference, where all the circumstances under which it came into existence were fully detailed. *Id.*
4. MORTGAGE IS MERE SECURITY FOR PAYMENT OF MONEY, and no breach of its conditions can possibly vest the title in the mortgagee. *Per Heydenfeldt, J. Id.*
5. AGREEMENT ENTERED INTO AT TIME OF MORTGAGE FOR CONVERTING INTEREST INTO PRINCIPAL from time to time, as it shall become due, is oppressive and unjust and tending to usury, and consequently it can not be supported. *Eslava v. Lepretre*, 266.
6. AGREEMENT THAT INTEREST ON MORTGAGE DEBT SHALL BE CONSIDERED PRINCIPAL, and shall carry interest, is valid where the interest has accrued, but there must be no extortion on the part of the mortgagee, otherwise equity will interpose for the relief of the mortgagor; and in such a case, where there is no other charge or incumbrance on the estate of which the mortgagee had notice at the time of the agreement, it will be allowed to be tacked to the mortgage, and there will be no objection to its forming a part of the consideration of a second mortgage given to secure the balance due on the first. *Id.*
7. WHERE INTEREST ON MORTGAGE DEBT RUNS IN ARREAR, and in the mortgagee's account of arrears, rests are made from time to time, on which interest is calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, is signed by the mortgagor, and confirmed by a mortgage deed, although executed after a lapse of several years, for securing the balance, the transactions are not usurious, and the mortgagor is liable. *Id.*
8. AGREEMENT BY WHICH MORTGAGOR AGREES TO PAY ADDITIONAL INTEREST, over and above the interest allowed by law, in consideration of his inability to pay the debt, and as an indemnity to the mortgagee for the

difference between the amount of interest allowed in this state for the debt and the amount the mortgagee was paying on money borrowed by him in Louisiana, is unjust and oppressive, and will be set aside in equity. *Id.*

9. MISTAKE IN STATING AMOUNT DUE ON MORTGAGE DEBT WILL NOT BE CORRECTED, and the sum omitted through mistake will not be considered as a part of the mortgage debt, to charge its payment upon the lands conveyed, where the rights of a subsequent mortgagee and of a purchaser of the equity of redemption have intervened before the mistake was discovered. *Id.*
10. ON REFERENCE TO MASTER TO FIND AMOUNT DUE UNDER MORTGAGE, the mortgagor should be allowed a credit for all sums paid by him in good faith for filling up and walling a lot of the mortgagee's, less whatever sums were received by him, and are unaccounted for, of rents and profits arising out of the lot, where the proof is ample that the mortgagor had authority to make the expenditure. *Id.*
11. IT IS NOT ERROR TO DECREE SALE OF WHOLE MORTGAGED PREMISES without ascertaining whether the amount due might not have been raised by a sale of a part of the mortgaged premises, if the defendants do not suggest that the value of the mortgaged estate exceeds greatly the amount secured by the mortgage, and that the premises are capable of subdivision, and move for a reference to the master to ascertain the facts and report upon the subject; and this, notwithstanding there are two mortgages, if they are between the same parties, and for the same debt, and differ only as to the premises conveyed. *Id.*
12. ON DECREE OF FORECLOSURE IT IS DISCRETIONARY WITH CHANCELLOR TO ALLOW TIME for the payment of sum reported by the master to be due; and he may decree a foreclosure and sale absolutely without giving day to the mortgagor, and such decree will be free from error. *Id.*
13. IF WIFE'S INSANITY IS SUGGESTED IN ACTION AGAINST HUSBAND AND WIFE to foreclose a mortgage, by the pleadings of both parties, the chancellor should allow no further proceedings in the case as to her, which could possibly affect her rights or interest, until he had inquired into the fact of her lunacy; and if on such investigation she should be found *non compos mentis*, he should appoint a committee or guardian *ad litem* to watch over her interest and defend her rights. *Id.*
14. WIFE IS PROPER PARTY TO BILL TO FORECLOSE MORTGAGE given by the husband and wife, and to subject her dower interest to the payment of the debt, and the chancellor can not proceed to a decree against her till she is properly brought in. *Id.*
15. WIFE IS NOT PROPERLY BROUGHT INTO COURT in an action against a husband and wife to foreclose a mortgage and subject her dower interest to the payment of the debt, where there is no prayer for process against her, but the process is prayed for, issued, and executed on her guardians, who were appointed for her by the court on the ground of her insanity, but on the petition of the husband merely, without notice to her and without the issue of a writ *de inquirendo* and the verdict of a jury thereon; guardians so appointed are not the legal representatives of the rights and interest of the wife. *Id.*
16. DECREE PRO CONFESSO SHOULD NOT BE RENDERED AGAINST NON-RESIDENT MORTGAGEE on notice by publication in a suit to foreclose a mortgage

- brought by a prior mortgagee, and where he has not submitted himself to the jurisdiction of the court, without requiring the bond provided for by our statute in cases of non-resident defendants. *Id.*
17. MORTGAGOR HAS RIGHT TO REDEEM WHERE MORTGAGEE BECOMES PURCHASER under a sale by virtue of a power contained in the mortgage. *Benham v. Rowe*, 342.
 18. MORTGAGEE IN POSSESSION NOT LIABLE FOR NOT LEASING PROPERTY DIFFERENTLY, and for rents and profits he might have thus received, if the complaint does not charge him with negligence or improper conduct in leasing the premises, but requires him simply to account for the rent he has actually received. *Id.*
 19. MORTGAGEE IN POSSESSION MUST EXERCISE SAME CARE AND SUPERVISION OVER MORTGAGED PROPERTY that a prudent man would over his own. *Id.*
 20. MORTGAGEE IN POSSESSION IS LIABLE FOR SUCH DAMAGES AS JURY MAY ASSESS, if he acts in bad faith towards the owner of the estate or is guilty of such negligence as will greatly injure him. *Id.*
 21. SALE IRREGULARLY MADE UNDER POWER IN MORTGAGE MUST STAND, if the mortgagor does not ask to have it set aside. *Id.*
 22. MORTGAGEE SELLING UNDER POWER IN MORTGAGE FOR ARTICLE OF FLUCTUATING VALUE, instead of money, is chargeable with the highest market value of the property sold, to be credited to the account of the mortgagor. *Id.*
 23. MORTGAGEE IN POSSESSION IS NOT ENTITLED TO COMPENSATION for managing the property and collecting the rents; his care and trouble are bestowed for the furtherance and protection of his own interests; he is *quasi* owner, and is not like a mere naked trustee or agent; and he takes the charge voluntarily upon himself. *Id.*
- See CORPORATIONS, 13; DOWER, 1; EXECUTORS AND ADMINISTRATORS, 4; TRUSTS, 3, 6.

MULTIFARIOUSNESS.

See EQUITY, 9-11.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 3-5, 21-27.

MURDER.

See NEW TRIAL, 1.

NAMES.

OMISSION OR ADDITION OF MIDDLE LETTER is not a misnomer or variance, as the law knows but one Christian name. *State v. Smith*, 287.

NECESSARIES.

See HUSBAND AND WIFE, 2-6.

NEGLIGENCE.

See DRUGGISTS; INSURANCE—MARINE, 2; RAILROADS, 1, 2.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE MADE PAYABLE TO MAKER OR ORDER, and by him indorsed to another, is but an ordinary promissory note, because until such indorsement it has no validity as such note. *Scull v. Edwards*, 294.
2. WHETHER PROMISE TO PAY IS IN PAST OR PRESENT TENSE, in a negotiable promissory note, it will not lose its character as such, although a bank may be deterred from discounting it. *Perkins v. Commonwealth*, 123.
3. NOTE PAYABLE TO PERSON "WHEN HE IS TWENTY-ONE YEARS OLD" is not a promissory note, negotiable under the Illinois statute. The contingency upon which such note is made payable may never happen, and therefore it is not certainly and at all events payable. *Kelley v. Hemmingway*, 474.
4. INSTRUMENT WHICH IS NOT PROMISSORY NOTE WHEN MADE can not become such by matter *ex post facto*. *Id.*
5. NEGOTIABLE NOTES GIVEN FOR GAMING CONSIDERATION ARE VALID IN HANDS OF INNOCENT INDORSEES, to whom they are transferred before maturity, except when such notes are made void by express statute. *Haight v. Joyce*, 311.
6. ONE WHO PUTS HIS NAME ON BACK OF NOTE before it is delivered to the payee is an original party to the note, and the original consideration for the note is the consideration for his undertaking. It is not necessary that he shall participate in or receive any part of the consideration. *Carroll v. Weld*, 481.
7. WHERE NAME OF PARTY IS FOUND ON BACK OF NOTE, in the hands of the payee, the presumption of law is that it was put there at the time of the execution, and in the absence of proof to the contrary, the law presumes that he assumed to guarantee the note. *Id.*
8. CONSIDERATION OF NOTE MAY BE IMPEACHED WITHOUT SWORN PLEA. *Holt v. Robinson*, 240.
9. PARTY SIGNING NOTE AS MAKER MAY BY EXTRINSIC EVIDENCE SHOW, whenever it is material, that he signed as surety, and that this was known to the party suing on the note. *Lime Rock Bank v. Mallett*, 673.
10. MAKER MAY SHOW THAT EXECUTION OF NOTE WAS OBTAINED BY FRAUD, and thus defeat a recovery upon it by the assignee who received it before maturity, under the Illinois statute; but any other defense, such as payment, is no defense to such a note unless the maker prove that the assignee had notice thereof when it was assigned. *Mobley v. Ryan*, 483.
11. PAYMENT ON NOTE ASSIGNED BEFORE MATURITY MADE TO ANOTHER THAN ASSIGNEE, and subsequent to assignment, is no defense against the assignee. *Id.*
12. INDORSEMENT WITHOUT DATE IS PRESUMED TO HAVE BEEN MADE before the maturity of the note. *Id.*
13. BURDEN IS ON MAKER TO SHOW THAT INDORSEMENT OF NOTE was made after maturity. *Id.*
14. ACCOMMODATION INDORSERS ARE PRIMA FACIE CO-SURETIES, as among themselves, when they successively sign the paper before it goes into circulation. *Pitkin v. Flanagan*, 61.
15. ORDER OF INDORSEMENT OF ACCOMMODATION INDORSERS RAISES NO PRESUMPTION OF DIFFERENT OBLIGATION among themselves from that growing out of the other facts of the case, where they all sign the paper

before it is put in circulation, and at the request of the person for whose benefit it is made, and to give him credit. *Id.*

16. INDORSEE OF NOTE PAYABLE TO MAKER OR ORDER acquires a primitive title and not derivative, and the indorsement to him is not technically such, but is part of the instrument itself. *Scully v. Edwards*, 294.
17. AVERMENTS OF DUE PRESENTMENT OF BILL OF EXCHANGE and of notice of its non-payment are, in an action against the indorser, supported by evidence of matter of excuse or a waiver of demand and notice. *Windham Bank v. Norton*, 397.
18. PRESENTMENT OF BILL OF EXCHANGE MUST BE MADE ON DAY on which it becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, to present it. *Id.*
19. WANT OF PRESENTMENT OF BILL OF EXCHANGE IS EXCUSED by any inevitable or unavoidable accident not attributable to the fault of the holder, provided presentment is made by him as soon afterward as he is able. *Id.*
20. WHERE HOLDER OF DRAFT TRANSMITS IT BY MAIL, which is the usual, legal, and proper mode, in season to reach the place where it is payable in time for presentment, by the regular course of the mail, but by the mistake of the postmaster the mail in which it is forwarded is sent beyond its destination, and not returned thereto until the second day after it is due, when the draft is duly presented, failure to make presentment on the day on which it became due will be thereby excused. *Id.*
21. INDORSEMENT, "RECEIVED, RENEWED," WITH DATE ATTACHED, MADE BY HOLDER, means that the interest for a renewal has been received, and that the note is to be the same as if made in the same terms anew from that date. *Lime Rock Bank v. Mallett*, 673.
22. WHEN PARTY SUES MAKER OF PROMISSORY NOTE upon a note which was made payable to maker or order and indorsed by him to the party suing, the maker's prayer for oyer is satisfied by setting out the note together with the indorsement. *Scully v. Edwards*, 294.
23. ACTION OF DEBT MAY BE BROUGHT UPON NOTE, and in such action it need not be averred or proved that there was any consideration for the note. *Snead v. Coleman*, 112.

See ASSIGNMENT OF CONTRACTS, 2; CRIMINAL LAW, 10, 13; GUARANTY; MORTGAGES, 1; PAYMENT, 1, 2; SURETYSHIP, 1, 2; TRUSTS, 2, 3, 6.

NEW TRIAL.

1. NEW TRIAL WILL BE ALLOWED TO PERSON CONVICTED OF MURDER when it is shown that the jury, previous to rendering the verdict, were permitted to converse and drink spirituous liquors with persons during the absence of the sheriff. *Commonwealth v. Wormley*, 162.
2. NEW TRIAL WILL NOT BE GRANTED ON ACCOUNT OF EVIDENCE DISCOVERED after the defendant had closed his evidence but before his case was submitted to the jury. Defendant ought to have moved the court to suspend the argument and let him offer the evidence at the time it was discovered. *Fleet v. Hollenkemp*, 563.
3. NEW TRIAL WILL NOT BE GRANTED FOR NEWLY DISCOVERED EVIDENCE if the applicant has been guilty of negligence in not sooner discovering and producing it. *Id.*

4. NEW TRIAL OUGHT NOT TO BE AWARDED TO PERMIT PARTY to offer evidence, unless it appears that such evidence, if received at the former trial, ought to or might have changed the result. *Id.*
5. WHERE ERROR OF COURT IN CHARGING JURY DOES NO INJURY, it is not a ground for a new trial. *Nicholson v. New York etc. R. R. Co.*, 390.
See DAMAGES, 4, 5.

NONSUIT.

See PLEADING AND PRACTICE, 25.

NOTICE.

See ASSIGNMENT OF CONTRACTS, 2; CORPORATIONS, 26; DEEDS, 6-12; EXECUTIONS, 12, 20-24; GUARANTY, 2, 6-8, 11; GUARDIAN AND WARD, 1, 2; JUDGMENTS, 24; MORTGAGES, 16.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 3.

NUISANCE.

See HIGHWAYS, 3, 7.

NUNC PRO TUNC ENTRY.

See JUDGMENTS, 7, 8.

OFFICERS.

See CORPORATIONS, 15, 21-24, 26, 27; LIENS, 8; PROCESS, 6-9; SHERIFFS; WITNESSES, 2.

OFFICERS DE FACTO.

See SHERIFFS, 2.

ORPHANS' COURTS.

See PROBATE COURTS.

OYER.

See NEGOTIABLE INSTRUMENTS, 22.

PARENT AND CHILD.

1. COMMON-LAW RULE AS TO LEGITIMACY OF OFFSPRING born in wedlock was that if a wife had issue while her husband was within the four seas, that is, within the jurisdiction of the king of England, such issue was conclusively presumed to be legitimate, except upon proof of the husband's impotence; but in modern times the severity of this rule has been abrogated, and the legal presumption of the husband's access, in such a case, may be controverted by other direct or presumptive evidence. *Wright v. Hicks*, 451.
2. CHILD BORN THREE MONTHS AFTER MOTHER'S MARRIAGE IS PRESUMED LEGITIMATE, but this presumption may be rebutted in either a civil or criminal case by evidence of non-access or other proof, either by the husband or by any other person having an interest in contesting the legitimacy. *Id.*

3. BURDEN OF PROOF IS ON PERSON CLAIMING TO BE LEGITIMATE SON of a decedent. *Weatherford v. Weatherford*, 206.
4. FILLATION IS ESTABLISHED by a satisfactory combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong. *Id.*
5. IF FILLATION IS ESTABLISHED, LAW RAISES PRESUMPTION OF LEGITIMACY, and the burden of proof is shifted on those asserting his illegitimacy. *Id.*
6. EVIDENCE PROVES FILLATION, BUT DISPROVES LEGITIMACY OF CHILD, when it shows that, after the death of the father, his wife took the complainant and educated him and reared him in her own family, but further shows that although the child was treated as a member of the family, he was never regarded as legitimate by her or her children. *Id.*
7. FATHER IS UNDER NO LEGAL OBLIGATION TO SUPPORT BASTARD in the absence of a statute. *Simmons v. Bull*, 257.
8. BILL FILED BY BASTARD AGAINST FATHER, alleging that the defendant had removed beyond the jurisdiction of the state to avoid the statutory liability for his support, leaving property in this state, and praying that a publication may be made, and that provision may be made for his support, can not be sustained. *Id.*
9. ALLEGATIONS IN BILL SEEKING TO BASTARDIZE ALLEGED HEIR of a decedent, born three months after the mother's marriage, are insufficient if the illegitimacy is not expressly charged, and if it is not alleged that no intercourse had ever taken place between the husband and wife before marriage. *Wright v. Hicks*, 451.

PAROL EVIDENCE.

See COMMON CARRIERS, 2-4; EVIDENCE, 5-17; NEGOTIABLE INSTRUMENTS, 9.

PARTIES.

See CORPORATIONS, 22, 23; CO-TENANCY, 4, 6; EXECUTORS AND ADMINISTRATORS, 7, 15; PLEADING AND PRACTICE, 1-3.

PARTITION.

1. PARTY OWNING UNDIVIDED HALF INTEREST IN LAND, BUT OCCUPYING WHOLE TRACT and receiving all the rents and profits, can not be compelled, in a suit in equity by a party owning half the property in severalty, to convey to the latter an undivided half of the premises, nor such portion thereof as he is entitled to possess in severalty; nor can the owner of the undivided half be coerced in equity to sue for partition and to account for the rents and profits, at least not by a court not possessing general equity powers, and among whose special powers this is not included. *Soutter v. Atwood*, 647.
2. PARTITION WILL NOT BE DECREED BETWEEN TENANT IN COMMON OF WHOLE AND OWNER IN SEVERALTY OF PART. Two tenants in common, one of whom gave a mortgage of his undivided half for its purchase price, divided the common property by metes and bounds, executing mutual deeds. The owner of the unmortgaged half conveyed his share in severalty to the plaintiff, and also executed to him a deed of an undivided half of the whole tract. The mortgage of the undivided half was foreclosed, and under the foreclosure the defendant claimed. *Held*, the plaintiff became owner of one half by metes and bounds. The de-

defendant is owner of an undivided half interest. The plaintiff failed to secure a title sufficient to enable him to dispossess the defendant, who occupies the whole tract. The defendant is guilty of no fraud, and the court has no jurisdiction on that ground to compel them to partition the property and account for the rents and profits. *Id.*

3. WHERE PARTIES OWNED TRACT OF LAND JOINTLY, and afterwards married and made subsequently a deed of partition of the same and held it in severalty afterwards, the partition so made will be binding on the parties, even though no certificate of privy examination of the wives appears in the deed. *Bryan v. Stump*, 139,

See JUDGMENTS, 9.

PARTNERSHIP.

1. DORMANT PARTNER TO WHOM VENDOR GIVES NO CREDIT, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm. *Brooke v. Washington*, 142.
2. DEATH, AS GENERAL RULE, DISSOLVES PARTNERSHIP. *Powell v. North*, 513.
3. COURT OF EQUITY HAS POWER TO AUTHORIZE CONTINUANCE OF PARTNERSHIP, after death of a partner, in behalf of the infant children of the deceased partner. *Id.*
4. WHEN PARTNERSHIP IS DISSOLVED BY DEATH of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested in the survivor exclusively, for the purpose of paying the debts and then dividing the net balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken had he been in life and the firm had been dissolved, not by death, but by mutual consent. *Andrews' Heirs v. Brown*, 252.
5. REAL ESTATE BELONGING TO FIRM IS CONSIDERED AS PERSONAL PROPERTY in equity, to the extent that it is liable to pay the debts of the firm and then to distribution between the partners, in the same manner as if it had been personal instead of real estate. *Id.*
6. CLAIM OF CREDITORS OF FIRM TO PARTNERSHIP REALTY is superior to a wife's right of dower and to the legal title of the heirs at law of a deceased partner. *Id.*
7. HEIR OF DECEASED PARTNER HOLDS LEGAL TITLE TO REAL PROPERTY belonging to the firm, subservient to or in trust for the surviving partner, who is charged with the payment of the debts. *Id.*
8. SURVIVING PARTNER HAS RIGHT IN EQUITY TO DISPOSE OF REAL PROPERTY belonging to the firm for the payment of the debts, where the firm is insolvent, and the deed will convey the equity of the heir of a deceased partner, who may be compelled to make a conveyance. *Id.*
9. LAND STANDING ON BOOKS OF OLD PARTNERSHIP AS PARTNERSHIP PROPERTY, and carried into a new firm formed from the old as a part of its capital, is partnership property of the new firm. *Id.*
10. ADVANCES TO FIRM AND ADVANCES FROM IT to one of its members do not constitute debts strictly speaking, but are only items in the account be-

tween the partners in the winding up of the concern. *Wilson v. Soper*, 573.

11. SURVIVING PARTNER WHO HAS BOUGHT INTEREST OF DECEASED PARTNER, may make an assignment of the merchandise for the benefit of his creditors, and the claimants under this assignment have a right to its proceeds, and also to all the debts which were created after the purchase made by the surviving partner. *Id.*
12. SURVIVING PARTNER HAS RIGHT TO APPLY ASSETS OF FIRM to the payment of partnership debts. He may prefer one creditor to another, and if he makes an assignment for the benefit of part of the creditors, they may under it entirely satisfy their debts. This does not increase the liability of the estate of the deceased partner, as it makes no difference to it whether the assets are distributed ratably or applied to the payment of some debts to the exclusion of others. *Id.*
13. ADMINISTRATOR OF DECEASED PARTNER HAS RIGHT IN EQUITY to have all the partnership effects of every description, including all the debts due to the firm, applied to the payment of all the debts owed by it. *Id.*
14. PERSONAL REPRESENTATIVES OF DECEASED PARTNER BECOME TENANTS IN COMMON with survivor, of all the partnership property or effects in possession, while the choses in action vest in the survivor, who has the right to control the partnership effects for the purpose of paying the debts and settling up the business. *Id.*
15. ADMINISTRATOR OF DECEASED PARTNER, BEING TENANT IN COMMON WITH SURVIVOR, has power to dispose of an undivided moiety of the stock of goods on hand, and thus vest the surviving partner with the title to the whole stock. *Id.*
16. UPON VOLUNTARY DISSOLUTION OF PARTNERSHIP, the partners may agree that the partnership property may be the property of one of the members, and if such agreement be *bona fide*, it will be given full effect. *Id.*
17. LIEN OF PARTNERSHIP CREDITORS FOR PAYMENT OF THEIR DEBTS is not upon the partnership property, but is derived from one of the partners who has a lien upon the partnership property for the payment of the partnership debts; and such lien by a partner, being derivative, ceases when he has divested himself of his interest. If the means by which he has divested himself of this interest is fraudulent, the creditors may be relieved in a court of chancery. *Id.*
18. PAYMENT OF JUDGMENT AGAINST SURVIVING PARTNERS BY EXECUTOR of the deceased partner operates as a satisfaction of the judgment, and the executor can not, by taking an assignment of the judgment, keep it alive to coerce payment from the surviving partners. *Hogan v. Reynolds*, 236.

See GUARDIAN AND WARD, 4.

PASSENGER CARRIERS.

See COMMON CARRIERS, 11-20.

PATENTS.

1. PURCHASER OF PATENTED ARTICLE, KNOWING THAT VENDOR HAD NO RIGHT either to manufacture or sell the same, can not recover from the vendor the money paid. *Bell v. Boney*, 601.

2. PARTY WHO VIOLATES PROVISIONS OF PATENT LAW by making and selling a patented article can not maintain an action to recover the purchase price thereof. *Id.*

PATENTS FOR LAND.

See PUBLIC LANDS.

PAYMENT.

1. NEGOTIABLE DRAFT TAKEN FOR PRE-EXISTING DEBT IS PAYMENT THEREOF. *Bangor v. Warren*, 657.
2. GIVING NEGOTIABLE NOTE FOR SIMPLE CONTRACT DEBT is *prima facie* evidence of payment. *Shumway v. Reed*, 679.
3. LEGAL PRESUMPTION OF PAYMENT ARISING FROM GIVING NEGOTIABLE NOTE for simple contract debt may be overcome by proof that such was not the intent of the parties. *Id.*
4. BOND TAKEN AS SECURITY FOR FUTURE INDEBTEDNESS of party overcomes presumption that the party, by giving negotiable notes for subsequent indebtedness, thereby paid the debt. *Id.*
5. PAYMENT BY DEBTOR TO NOMINAL CREDITOR, NOT REAL CREDITOR, and known to be such, is not a performance of one of the conditions of a bond by payment of the debt, nor would the payment of the entire debt to a part owner have that effect, when there was knowledge of an equitable interest in another of a portion of it. *Hobson v. Watson*, 632.
6. ACTION FOR GOODS SOLD AND DELIVERED NOT BARRED by an agent, who was authorized to receive the vendee's note for the price, receiving a note of a less amount, signed by the vendee as agent of a third person, under the vendee's representations that it was the latter's note for the price, and delivering the same to the vendor, who did not consent to accept it as payment; nor does it affect the rights of the vendor that he retained the note until the commencement of the action without taking measures to enforce its collection, or giving notice of its non-payment, or offering to return it. *Hatch v. Barnum*, 59.

See JUDGMENTS, 18-21; PARTNERSHIP, 18; SHERIFFS, 3.

PERJURY.

See CRIMINAL LAW, 11.

PILOTS.

See INSURANCE—MARINE, 4; SHIPPING, 1.

PLEADING AND PRACTICE.

1. REAL PARTY IN INTEREST BEING PLAINTIFF, an objection that the contract in question was made by him as agent for others will not be considered. *Salmon v. Hoffman*, 322.
2. ASSIGNOR OF CONTRACT FOR SALE OF LAND IS NOT NECESSARY PARTY, in Indiana, to suit by the assignee for specific performance thereof, as under the statute of this state the assignment of such an instrument carries with it the legal title, and not a mere equity. *Colerick v. Hooper*, 505.
3. DEATH OF DEFENDANT ABATES ACTION OF TRESPASS for a direct and immediate injury to a chattel, and the action can not be revived against his personal representative. *Petts v. Ison*, 419.

4. ACTION OF DEBT WILL NOT LIE TO RECOVER AMOUNT OF LICENSE for the keeping of a gaming-table, where the license act does not provide for such action. The statute must be strictly followed, and the only remedy is by indictment. *People v. Craycroft*, 331.
5. DECLARATION THAT DEFENDANT AGREED TO DO CERTAIN THING at a specified time and place is sufficient without alleging demand and refusal, as in order to excuse himself defendant must show in his plea either that he did the thing agreed to be done, or that he was ready to do it. *Patterson v. Jones*, 296.
6. DECLARATION ON CONTRACT IN PARTIAL RESTRAINT OF TRADE need not expressly aver the reason to support the restraint, if it sufficiently appears from the contract itself, which is set forth in the declaration. *Kellogg v. Larkin*, 164.
7. DEMURRER ADMITS ONLY FACTS WELL PLEADED. *Id.*
8. NO AVERMENT CAN GIVE TO AGREEMENT CHARACTER IT HAD NOT, and no admission can take from it the character it had, where an agreement is laid before the court for construction. *Id.*
9. AFFIRMATIVE RESTS ON PLAINTIFF, in contemplation of law, and he has the right to open and conclude. *Benham v. Rowe*, 342.
10. PLAINTIFF'S CLAIMING MORE THAN HE PROVED, or more than he legally could demand, or his presenting his claim on different grounds in different counts in his declaration, forms no objection to his right to recover in an action to recover damages of the defendant for erecting a shop upon a road so near the plaintiff's store as to deprive him of the use of the road and store. *Cole v. Sprowl*, 696.
11. CAUSES OF ACTION SET FORTH IN COMPLAINT CAN BE RECOVERED UPON ONLY; and concurrent and intimate causes of action can not as a matter of course be given in evidence, nor made the basis of a verdict, under the act which declares that "there shall be but one form of civil action." *Benedict v. Bray*, 332.
12. OBJECT OF CALIFORNIA STATUTE IN REFERENCE TO AMENDMENTS TO PLEADINGS is the furtherance of justice, and to that extent applications for amendments ought to be treated favorably. *Cooke v. Spears*, 348.
13. ALLOWING AMENDMENTS TO PLEADINGS IS PASSED TO DISCRETION OF COURT by the California statute declaring that courts may, "in furtherance of justice," permit amendments to be made; but if that discretion is shown by the record to have been abused, in that it has been illegally exercised, it would be the duty of the appellate court to correct it. *Id.*
14. AMENDMENT SETTING UP PLEA OF STATUTE OF LIMITATIONS, IN ANSWER, WILL NOT BE ALLOWED, unless it would further the ends of justice. *Id.*
15. REFUSAL OF INSTRUCTION ON ABSTRACT PROPOSITION IS NOT ERROR. *Cole v. Sprowl*, 696.
16. INSTRUCTION ON QUESTION ENTIRELY ABSTRACT IS PROPERLY REFUSED. *Benham v. Rowe*, 342.
17. COURT IS NOT BOUND TO CHARGE JURY ON ABSTRACT QUESTIONS of law arising on facts of which there is no proof in the case. *Cowles v. Bacon*, 371.
18. MISAPPREHENSION OF PROOF OR LAW IN CHARGE OF COURT, which, it is apparent, may have defeated justice, is ground of reversal. *Terry v. Buffington*, 423.

19. INSTRUCTIONS ERRONEOUS IN ONE POINT, BUT COLLECTIVELY CORRECT, and properly expounding the law as a whole, are not ground for a reversal, and the instructions are to be taken as a whole. *Id.*
20. EXPRESSION OF OPINION BY JUDGE, THAT THERE IS NO EVIDENCE going to prove a contested fact, to one of the jury who returns, after the retirement of the jury, to make inquiry on that point, is error, under the Georgia statute of 1850. *Rushin v. Shields*, 436.
21. REJECTION OF PROPER INSTRUCTIONS WILL NOT AUTHORIZE REVERSAL OF JUDGMENT, when those given cover the whole ground. *New York Life Ins. Co. v. Flack*, 742.
22. REMARK BY JUDGE THAT HE WILL GIVE STATE BENEFIT OF DOUBTS in passing on a motion to quash an indictment, where he says he has doubts, on the ground that the state has no appeal, is not error, nor is it a censurable irregularity. *Cook v. State*, 410.
23. SUPREME COURT CAN PASS UPON THOSE INSTRUCTIONS ONLY WHICH ARE STATED in the report. *Cole v. Sprowl*, 696.
24. VERDICT WILL NOT BE SET ASIDE where a court, in response to an inquiry propounded by a jury, correctly state the law. *Perkins v. Commonwealth*, 123.
25. PLAINTIFF, WHEN SURPRISED BY REJECTION OF HIS EVIDENCE, MAY TAKE NONSUIT, and then move to set it aside and reinstate the case; and if the evidence was erroneously rejected, and the court refuses to reinstate, its judgment will be revised on appeal or writ of error. *Easterling v. Blythe*, 45.
26. REPLEADER WILL BE AWARDED AND COSTS TO ABIDE FINAL EVENT OF SUIT, where the substance of the defense as set forth in the plea is good but the plea is bad in form. *Parkhurst v. Sumner*, 94.
27. CIRCUIT COURT HAS POWER TO ORDER CLERK TO COPY INTO RECORD writs and returns showing notice to defendants in a bill upon which decree was rendered by default, after the expiration of the term of court at which the decree was made, and after the issuing of a *certiorari* from the supreme court to obtain a new transcript, the former one being defective in not showing the notice; it having been made to appear at the time the court entered the order that, on taking the default, proof of the service of the writs was duly made. *Colerick v. Hooper*, 505.
28. COURT CALLING UPON COUNSEL IN PRESENCE OF JURY TO WAIVE LEGAL RIGHT constitutes an irregularity, as where the court asks counsel in presence of a juror if they will allow the written charge to be sent to the jury; but the court will not grant a new trial for this irregularity alone. *Terry v. Buffington*, 423.
29. CLERICAL ERROR IN MAKING UP RECORD in a lower court should be corrected in that court upon motion, and not by appeal to the higher court. *Snead v. Coleman*, 112.
30. RIGHT TO APPEAL FROM DECREE OR ORDER, UNLESS IT BE FINAL DECREE, or order in the nature of a final decree, was taken away by the Maryland act of 1830, c. 185; and although the right to an immediate appeal is restored by the act of 1841, c. 11, the party may waive this right, and on appeal from the final decree or order may allege error in all previous interlocutory orders passed in the progress of the cause. *Ware v. Richardson*, 762.

31. APPELLATE COURT CAN NOT DECIDE UPON GENERAL MERITS OF CASE PRESENTED BY EXCEPTIONS, but can determine merely the legality of the proceedings excepted to. *Miller v. Goddard*, 638.
 32. ALL ASSIGNMENTS OF ERROR SHOULD POINT TO PARTICULAR PART OF PROCEEDINGS of the court below in which the error complained of is thought to exist. *Eslava v. Lepretre*, 266.
 33. ERROR IN JUDGMENT OF COURT BELOW WILL NOT BE PRESUMED by appellate court; it must be clearly disclosed. *Thompson v. Monrow*, 318.
 34. IF FACTS OF CASE ARE AGREED UPON, and the questions of law alone are submitted to the court for its judgment, the court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising thereon. *Bott v. McCoy*, 223.
 35. JUDGMENT OF COURT UPON FACTS WILL NOT BE REVISED where the judge is substituted by the consent of the parties in lieu of the jury; if the evidence be conflicting and he decides against the weight of testimony, or if it would have justified an inference of fact which the court refused to draw, this court will not reverse his judgment merely because it could or might have come to a different conclusion of fact (opinion on rehearing). *Id.*
 36. JUDGMENT WILL NOT BE REVERSED FOR ERROR where the substantial rights of a party are not affected. *Kilburn v. Ritchie*, 326.
- See ARBITRATION AND AWARD; ATTACHMENTS; CRIMINAL LAW, 3-21; CORPORATIONS, 22, 23, 26; CO-TENANCY, 4-6; EQUITY; EVIDENCE; EXECUTORS AND ADMINISTRATORS, 7, 15; FRAUD, 2, 4, 6; INJUNCTIONS; JUDGMENTS; JURISDICTION; MORTGAGES, 9-16; NEGOTIABLE INSTRUMENTS, 9, 10, 13, 17, 22, 23; NEW TRIAL; PARENT AND CHILD, 8, 9; STATUTE OF LIMITATIONS; STATUTES, 3; TRESPASS, 2; TROVER.

PLEDGES.

See FACTORS.

POWERS.

See EXECUTORS AND ADMINISTRATORS, 8, 9.

POWER OF ATTORNEY.

See TRUSTS, 16.

PREFERENCES.

See PARTNERSHIP, 12.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS, 17-20.

PRESUMPTIONS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; CONFLICT OF LAWS, 3; CONSTITUTIONAL LAW, 3; CORPORATIONS, 15; EXECUTORS AND ADMINISTRATORS, 16; FRAUD, 4, 6; INSURANCE—MARINE, 3; MARRIAGE AND DIVORCE, 2; NEGOTIABLE INSTRUMENTS, 12, 15; PARENT AND CHILD, 1, 2; PAYMENT, 3.

PRINCIPAL AND AGENT.

See AGENCY; MASTER AND SERVANT.

PROBATE COURTS.

PROBATE COURTS OF INDIANA POSSESS GENERAL EQUITY POWERS in relation to the administration and guardianship of estates. *Powell v. North*, 513.

See EXECUTORS AND ADMINISTRATORS, 6, 11, 17; GUARDIAN AND WARD, 4.

PROCESS.

1. UNDER STATUTE PROVIDING THAT PARTY SERVED WITH PROCESS be summoned "forthwith" before the justice or judge issuing the warrant, a warrant commanding the party served to be summoned "forthwith to appear at a court to be holden at my office in Frankfort at such time as you may appoint," though irregular, protects the officer serving. *State v. McNally*, 650.
2. STEAMBOAT OR VESSEL MOORED AT WHARF IS "PLACE" LIABLE TO BE SEARCHED, within meaning of a statute that provides that "any store, shop, warehouse, or other building or place in said city or town" may be searched. *Id.*
3. WARRANT NEED NOT BE UNDER SEAL OF MAGISTRATE ISSUING IT unless it be expressly required by statute. *Id.*
4. WAFFER ATTACHED TO WARRANT, WHICH IS USUAL SEAL IN SUCH CASES, is *prima facie* sufficient without proof that it was the seal of the magistrate, or adopted by him. *Id.*
5. WARRANT PURPORTING TO BE ISSUED BY JUSTICE OF PEACE, upon a complaint sworn to before him in that capacity, furnishes a presumption that he was legally authorized so to act. *Id.*
6. NO ONE IS JUSTIFIED IN RESISTING OFFICER ACTING UNDER PROCESS that he is legally authorized to obey. *Id.*
7. VOID PROCESS IS NO JUSTIFICATION TO OFFICER. *Id.*
8. PROCESS, ALTHOUGH VOIDABLE FOR IRREGULARITY OR MISTAKE, PROTECTS OFFICER who serves it if the magistrate who issued it had jurisdiction of the subject-matter, and the process is regular on its face and does not disclose want of jurisdiction. *Id.*
9. SHERIFF'S RETURN UPON WRIT THAT HE SERVED PROCESS upon certain named defendants, and could not find the others, imports that a personal service was made upon those found. *Colerick v. Hooper*, 505.

See ATTACHMENTS; EXECUTIONS; INJUNCTIONS.

PROFESSIONAL SERVICES.

See MASTER AND SERVANT, 1, 2.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See EVIDENCE, 4.

PUBLIC LANDS.

1. CERTIFICATE OF PURCHASE FROM UNITED STATES LAND OFFICE, ISSUED PRIOR TO PATENT, conveys the absolute title, and a patent subsequently acquired relates back to the date of said certificate. *Cavender v. Smith*, 541.
- 2 ONE WHOSE LANDS, HELD UNDER CERTIFICATE OF PURCHASE, but for which the patent has not been issued, are sold under execution, can not set up the subsequently acquired patent to defeat an action brought for the possession thereof. *Id.*

RAILROADS.

1. GENERAL LAW REQUIRING BELL OR WHISTLE TO BE ATTACHED TO EACH LOCOMOTIVE ENGINE of a railroad company, and to be rung or whistled before crossing any other road, is applicable to and binding on a corporation created prior to its passage; and an omission to give the required signal is *prima facie* proof of negligence on the part of such corporation. *Galena etc. R. R. Co. v. Loomis*, 471.
 2. RAILROAD CORPORATIONS ARE NOT LIABLE FOR ANY AND ALL DAMAGES that a person may sustain, when they have omitted to give a signal required by law. Until some proof is given tending to show that the injury resulted from a failure to give such signal, the burden of proving that it did not arise from such failure is not thrown upon the corporation. *Id.*
 3. ROLLING STOCK AND FURNITURE OF RAILROAD ARE PERSONAL PROPERTY. *Sangamon etc. R. R. Co. v. Morgan Co.*, 497.
- See CORPORATIONS, 11, 12; EMINENT DOMAIN; HIGHWAYS, 5, 6; TAXATION, 10-13.

REAL ESTATE.

See MINES; PUBLIC LANDS.

REAL ESTATE AGENT.

See AGENCY, 3.

RECEIPTS.

See COMMON CARRIERS, 1, 4; EVIDENCE, 5; FRAUD, 2.

RECITALS.

See EXECUTIONS, 20.

RECORDING.

See DEEDS, 6-12; EVIDENCE, 2, 3.

REDEMPTION.

See EXECUTIONS, 6, 18; MORTGAGES, 17.

REFERENCE.

See ARBITRATION AND AWARD; EQUITY, 17-19; MORTGAGES, 10.

RELATIONSHIP.

See AFFINITY; CONSANGUINITY.

RELEASE.

See EQUITY, 4, 13.

REMAINDERMAN.

See TRESPASS, 5.

RENT.

See LANDLORD AND TENANT, 1, 2; MORTGAGES, 18; PARTITION, 1.

REPEAL OF STATUTES.

See STATUTES, 4, 5.

REPLEADER.

See PLEADING AND PRACTICE, 26.

RES ADJUDICATA.

See JUDGMENTS, 12-15.

RESCISSION OF CONTRACTS.

See CONTRACTS, 10, 11; VENDOR AND VENDEE, 9, 10.

RESCISSION OF SALES.

See SALES, 13, 14.

RESIDENCE.

See CORPORATIONS, 11, 12; TAXATION, 3-7, 10.

RESTRAINT OF TRADE.

See CONTRACTS, 5-7.

RESULTING TRUSTS.

See TRUSTS, 3, 4, 6.

RETURNS.

See PROCESS, 9.

REVERSIONER.

See TRESPASS, 5.

ROADS.

See HIGHWAYS.

SALES.

1. AGREEMENT—ABSOLUTE SALE.—A. buys from B., administrator, etc., certain property, for which he gives his note, the sale to become absolute when A. should furnish security for the payment of said note; A. is afterwards appointed guardian of B.'s intestate, and A. and B. agree that A. shall hold the above purchase price, and charge himself with it as guardian: *Held*, that the agreement was good, and that the sale became absolute. *Wilson v. Soper*, 573.

2. WHERE OWNER OF GOODS, BY VOLUNTARILY PARTING WITH POSSESSION THEREOF, clothes a vendee with the *indicia* of ownership, he must bear the loss, as between him and an innocent purchaser from such vendee. But this principle does not apply to sales upon condition, and where the original owner has never consented to the transfer of the property. *Jennings v. Gage*, 476.
3. OWNER OF PERSONAL PROPERTY CAN NOT BE DIVESTED OF IT without his consent; but if he consent to its transfer, though such consent be only temporary and obtained by fraud, and therefore revocable as against such unfair purchaser, yet an honest purchaser from him will be protected, and the first owner must bear the loss. *Id.*
4. MANUFACTURER CAN NOT RECOVER VALUE OF ARTICLE MANUFACTURED until the property has passed from him to the customer. *Moody v. Brown*, 640.
5. TITLE TO MANUFACTURED PROPERTY IS CHANGED FROM MANUFACTURER TO CUSTOMER only by the assent of both parties. *Id.*
6. MERE ORDER GIVEN FOR MANUFACTURE OF ARTICLE DOES NOT AFFECT TITLE. *Id.*
7. MANUFACTURED ARTICLE CONTINUES TO BE MANUFACTURER'S PROPERTY until completed, tendered, and accepted by the party ordering it. There must be proof of acceptance, or of act or words respecting it, from which an acceptance may be inferred. *Id.*
8. LEAVING MANUFACTURED ARTICLE WITH PARTY THAT HAS ORDERED IT will not transfer title to him, if done against his will. *Id.*
9. PROPERTY IN MANUFACTURED ARTICLE PASSES TO PARTY ORDERING IT, without tender and acceptance of it, when he employs a superintendent, and pays for it by installments as the work is performed. *Id.*
10. VENDEE OF GOODS MERELY CONTRACTED TO BE SOLD, but never actually delivered, has no right to the possession of them until the sale is consummated, and if, before consummation of the sale, he obtains possession surreptitiously, and without the consent of the vendor, the latter may recover it again without a rescission of the contract. *Jennings v. Gage*, 476.
11. IN CASE OF SALE AND DELIVERY OF GOODS TITLE PASSES TO VENDEE, but in case of a mere contract for a sale, the title remains with the original owner. *Id.*
12. RETURN OF CONSIDERATION IS NECESSARY ONLY WHEN VENDOR SEEKS TO AVOID the contract under which he has parted with his goods. *Id.*
13. PARTY WISHING TO RESCIND SALE OF JACK, FOR FRAUD, BY TENDERING him back to the seller, must do so absolutely, by leaving him in the seller's stable or upon his premises, and must not, after the seller's refusal to accept him, take him home and use him as his own. *McCulloch v. Scott*, 561.
14. ONE WHOSE TENDER OF CHATTEL FOR PURPOSE OF RESCINDING SALE IS REFUSED, and who takes it back and uses it as his own, thereby waives the benefit of his tender, and his remedy is an action at law for damages. In such a case his bill for a rescission must be dismissed without prejudice to such action. *Id.*
15. IT IS NOT NECESSARY TO ALLEGE DEFENDANT'S KNOWLEDGE of the un-

soundness of a chattel at the time of sale in an action brought for breach of warranty, nor is it necessary to prove the allegation. *Trice v. Cockran*, 151.

See FACTORS; PATENTS; PAYMENT, 6; SHIPPING, 2-5.

SALES OF REALTY.

See VENDOR AND VENDEE.

SATISFACTION.

See JUDGMENTS, 18-21.

SCIRE FACIAS.

See JUDGMENTS, 21.

SEALS.

See CORPORATIONS, 14; DEEDS, 1; PROCESS, 3, 4.

SEARCH WARRANT.

See PROCESS, 2; STATUTES, 2.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 7-9; MARRIED WOMEN, 2-8.

SET-OFF.

See LANDLORD AND TENANT, 4.

"SHELLEY'S CASE."

1. RULE IN SHELLEY'S CASE CONSTRUES WORDS "HEIRS" OR "HEIRS OF BODY" AS WORDS OF LIMITATION, and not of purchase; and these terms are regarded as conclusive evidence of the testator's or grantor's intent to use them in their legal sense and to give them their legal effect, although a real intention to the contrary may be defeated. In all such cases the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance. *Ware v. Richardson*, 762.
2. WORD "HEIRS" IS TERM OF PURCHASE, AND NOT OF LIMITATION; and the intention prevails against the strict construction to the contrary, whenever words of explanation are annexed indicating that the testator or grantor meant to use the term in a qualified sense, as a mere *descriptio personarum*, and that they and not the ancestor were to be the points from which the succession was to emanate. *Id.*
3. ESTATES WILL NOT COALESCE IN ANCESTOR UNDER RULE IN SHELLEY'S CASE if the estate limited to the ancestor is an equitable or trust estate; and the result would be the same if the estate for life was a legal estate, and that limited to the heirs an equitable estate. *Id.*
4. RULE IN SHELLEY'S CASE IS FULLY RECOGNIZED AND ADOPTED IN MARYLAND; and with its qualifications must prevail as a part of the system of real law, whatever may have been its origin or philosophy. *Id.*
5. WORDS "LEGAL HEIRS" ARE NOT CONVERTED FROM WORDS OF LIMITATION TO WORDS OF PURCHASE by any expressions in a deed, which, after granting a life estate, provides that "from and immediately after the death of the said E., then to and for the use and benefit of the legal

heirs and representatives of the said E., and to and for no other intent and purpose." *Id.*

SHERIFFS.

1. SHERIFF MAKING DEED RATIFIES LEVY AND SALE BY DEPUTY, for the purchaser's protection, though the deputy acted without any regular appointment. *Brooks v. Rooney*, 430.
2. ACTS OF DEPUTY SHERIFF DE FACTO ARE GOOD as to third persons. *Id.*
3. SHERIFF'S PAYMENT OF JUDGMENT RENDERED AGAINST HIM FOR NEGLIGENCE to make the money will not operate as a payment of the original judgment unless the defendant in the execution insist upon such payment as a satisfaction, thus recognizing it as a payment made for his benefit and at his request. *Poe v. Dorrah*, 196.

See CO-TENANCY, 4-6; EXECUTIONS; PROCESS, 9.

SHERIFFS' DEEDS.

See EXECUTIONS, 19-25; SHERIFFS, 1.

SHERIFFS' SALES.

See EXECUTIONS, 6, 14-30; TRUSTS, 18, 20, 21.

SHIPPING.

1. MASTER IS BOUND TO SECURE SERVICES OF PILOT when entering foreign port where pilots are employed, and must approach pilot ground with caution. *DeDowell v. General Mut. Ins. Co.*, 619.
2. WHERE SHIP, DISABLED BY STRESS OF WEATHER, puts into an intermediate port, and from her necessities part of the cargo is sold at a loss, its whole amount is not general average, but only such proportion as the general average charges bear to the whole amount disbursed. *Hassam v. St. Louis Perpetual Ins. Co.*, 591.
3. MASTER HAS NO AUTHORITY TO SELL ANY PART OF CARGO, when voyage is broken up at an intermediate port, to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages. *Id.*
4. MASTER HAS NO LEGAL RIGHT TO SELL CARGO OF SHIPWRECKED VESSEL, where cargo is in condition to reship, and the means of transportation can be procured. *Rugely v. Sun Mutual Ins. Co.*, 603.
5. MASTER JUSTIFIED IN SELLING CARGO OF SHIPWRECKED VESSEL is bound to give such notice as will warn parties of the time and manner of sale. *Id.*

See COMMON CARRIERS; EVIDENCE, 4; INSURANCE—MARINE; PROCESS, 2; TAXATION, 5.

SHIPWRECK.

See SHIPPING, 4, 5.

SLANDER OF TITLE.

1. INSTRUCTION THAT MALICE IS PRESUMED WHERE ONE INJURIOUSLY SLANDERS ANOTHER'S TITLE is erroneous, and well calculated to mislead a jury. *McDaniel v. Baca*, 339.

2. MALICE DOES NOT ACCOMPANY PUBLICATION OF CAUTION AS TO TITLE made by a grantor of land, when the circumstances warranted a strong presumption that fraud had been attempted upon him to get possession of his estate. *Id.*

See FRAUD, 2.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF WRITTEN INSTRUMENT MAY BE ENFORCED when it contains all the facts of the contract except such as may be legitimately proved by parol evidence. *Colerick v. Hooper*, 505.
2. CONTRACT TO CONVEY SPECIFICALLY WILL BE ENFORCED IN EQUITY, though the party may have a remedy at common law. *Buck v. Swazey*, 681.

STABLE-KEEPER.

See LIENS, 2.

STATUTES.

1. PRINTER'S PUNCTUATION OF PUBLISHED STATUTES may be an uncertain guide to their interpretation. *State v. McNally*, 650.
2. IN STATUTE PROVIDING FOR ISSUANCE OF SEARCH-WARRANT "to any sheriff, city marshal or deputy," the term "deputy" relates to both the marshal and sheriff preceding it, and the warrant may be issued to a deputy sheriff. *Id.*
3. STATUTORY REMEDY MUST BE PURSUED where both the right and the remedy are given by statute; although if the right existed at common law, and a remedy is given by statute, the latter is regarded as cumulative, and either remedy might be pursued. *People v. Craycroft*, 331.
4. INCIPIENT RIGHTS NOT PERFECTED, GIVEN BY STATUTE, MAY BE TAKEN AWAY BY STATUTE. *Bangor v. Goding*, 688.
5. REPEAL OF STATUTE GIVING LIEN TO LABORERS PENDING ACTION destroys the right of action where there is no saving clause in the repealing statute; and this, notwithstanding that an attachment had been levied by virtue of the prior statute. *Id.*

See CONSTITUTIONAL LAW; TRESPASS, 2.

STATUTE OF FRAUDS.

PAROL PROMISE TO PAY FOR IMPROVEMENTS MADE UPON LAND is not within the statute of frauds. *Godeffroy v. Caldwell*, 360.

See GUARANTY, 10; MINES, 4.

STATUTE OF LIMITATIONS.

STATUTE OF LIMITATIONS SHOULD BE PLEADED IN FIRST INSTANCE, and allowed no grace of right thereafter, where it is claimed solely as a legal advantage; courts are not inclined to favor statutes of limitation except when used as instruments of justice, and not of strategy. *Cooke v. Spears*, 348.

See PLEADING AND PRACTICE, 14.

STREETS.

See HIGHWAYS, 4, 5.

SUCCESSION.

See HUSBAND AND WIFE, 13; CONFLICT OF LAWS, 4

SUPPLEMENTAL BILLS.

See EQUITY, 13.

SURETYSHIP.

1. HOLDER OF PROMISSORY NOTE EXTENDING TIME OF PAYMENT TO MAKER by contract, upon sufficient consideration, discharges an apparent maker that he knows to be a surety, and whose consent to the extension has not been given. *Lime Rock Bank v. Mallett*, 673.
2. SURETY ON PROMISSORY NOTE IS DISCHARGED BY BINDING EXTENSION OF TIME given to the maker by the holder, without the surety's consent, although he may have consented to a previous contract of the same kind. *Id.*
3. RECORD OF RECOVERY AGAINST SURETIES ON BOND IS COMPETENT EVIDENCE AGAINST CO-SURETIES, in a suit for contribution, of the amount of recovery, but not of the default of the principal; and the fact that the case was referred in the county court, and that judgment was entered by consent in the supreme court, will not affect the judgment as evidence, the necessity of these steps being sufficiently explained. *Fletcher v. Jackson*, 98.
4. SURETIES' RIGHT OF CONTRIBUTION FOR COSTS AND EXPENSES IN DEFENDING SUIT EXISTS AGAINST CO-SURETY when the defense was made under such circumstances as to be regarded hopeful and prudent. *Id.*
5. SURETIES JOINTLY PAYING JUDGMENT AGAINST THEM MAY SUE JOINTLY in equity the heirs of a deceased co-surety for contribution; and a decree may be made against the defendants severally for so much as each is liable. *Id.*
6. SURETY'S COLLATERAL OBLIGATION OF CONTRIBUTION IS RELEASED by his co-sureties executing to the principal a general release of all liability for any sums they should pay; and it does not make any difference that the release was only intended to remove the principal's interest, in order that he might testify in the suit against the co-sureties. *Id.*
7. SURETIES HAVE RIGHT TO CLAIM CONTRIBUTION FROM EACH OTHER in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. *White v. Banks*, 283.
8. IF OFFER OF SECURITY IS MADE BY PRINCIPAL UPON CONDITION THAT SURETIES EXECUTE RELEASE, the refusal by one to accept the terms offered would not prevent the other from acceding to the proposition; and in such case, although the surety refusing would have a right to demand that the proceeds of the securities received should be fairly devoted to the reduction of the common debt, such proceeds could in no other way inure to his benefit; and the payment, so far as the right of contribution is concerned, would be considered as made by the paying surety out of his own funds, and if it amounted to his proportion of the debt, it would discharge him from contribution. *Id.*

9. REFUSAL BY SURETY TO ACCEPT FRAUDULENT DEED OF ASSIGNMENT by the principal for the benefit of his creditors deprives him of his right of contribution against a co-surety who has accepted the deed, when the deed has been executed, as to the assenting creditors, and the co-surety has received under it an amount exceeding his contributive share, and has applied it on the debt. *Id.*
- See BONDS; EXECUTORS AND ADMINISTRATORS, 1; GUARDIAN AND WARD, 6; GUARANTY; NEGOTIABLE INSTRUMENTS, 9, 14, 15; WITNESSES, 3.

SURPRISE.

See EQUITY, 5; PLEADING AND PRACTICE, 25.

TAXATION.

1. QUO MODO OF TAXATION IS MATTER OF LEGISLATIVE CONTROL, and the statute must be steadily followed, notwithstanding the constitution provides that all property shall be taxed. *De Witt v. Hays*, 352.
2. JURISDICTION OF COUNTY TO LEVY TAX ON REAL ESTATE does not extend beyond its own limits, for real estate necessarily has a fixed and unchangeable locality. *Sangamon etc. R. R. Co. v. Morgan Co.*, 497.
3. PERSONAL PROPERTY FOLLOWS, WITH CERTAIN QUALIFICATIONS, RESIDENCE OF OWNER, and is there taxable. *Id.*
4. PERSONAL PROPERTY TEMPORARILY ABSENT FROM OWNER'S RESIDENCE and to be immediately returned is taxable at the owner's residence. *Id.*
5. SHARE OF PART OWNER OF STEAMBOAT OCCASIONALLY TOUCHING AT CITY in which he resides, but not enrolled or usually lying there, is not taxable there under a charter providing for the taxation of property within that city. *New Albany v. Meekin*, 552.
6. SITUS OF PERSONAL PROPERTY DOES NOT FOLLOW DOMICILE OF ITS OWNER for purposes of taxation. *Id.*
7. NON-RESIDENTS ARE NOT EXEMPTED FROM TAXATION because section 8 of the California revenue act of 1851 provides that "every person shall be listed in the county where he resides." *Minturn v. Hays*, 366.
8. LEGISLATURE HAS NO POWER TO EXEMPT FROM TAXATION ANY SPECIES OF PROPERTY, however owned, under section 13 of article 11 of the California constitution, which declares that "all property in this state shall be taxed in proportion to its value." *Id.*
9. PROPERTY MAY BE TAXED IN ONE STATE ALTHOUGH TAXED IN ANOTHER, especially when it is within the limits of the former, and without the limits of the latter. *Id.*
10. COUNTY IN WHICH RAILROAD COMPANY HAS NO RESIDENCE CAN NOT TAX the proportion of the company's personal property which the length of track in that county bears to the whole length of the track within the state. *Sangamon etc. R. R. Co. v. Morgan Co.*, 497.
11. COUNTY AUTHORIZED TO TAX PROPERTY WITHIN ITS LIMITS may tax the portion of a railroad track within its limits. *Id.*
12. VALUATION FOR COUNTY TAXATION OF PORTION OF RAILROAD WITHIN COUNTY must be of that portion of road within the county, irrespective of the value of the whole road, and not of an undivided part of the value of the whole road. *Id.*
13. RULES FOR ASSESSMENT AND VALUATION OF RAILROAD FOR CITY PURPOSES are the same as those for county purposes. *Id.*

14. PERFECT REMEDY EXISTS AT LAW, AND EQUITY HAS NO POWER TO INTERFERE if a tax upon a franchise has been illegally interposed, or a valid objection appears upon the face of the proceedings. *De Witt v. Hays*, 352.
15. CLOUD ON TITLE NOT CAST, NOR IRREPARABLE INJURY WROUGHT, by the sale of a wharf for taxes, where the plaintiffs do not pretend to a title in the soil, but only to an interest in the franchise. *Id.*
16. EQUITY CAN NOT TAKE COGNIZANCE OF CASES INVOLVING SIMPLY QUESTION OF TAXATION; the issue is strictly one at common law. *Minturn v. Hays*, 366.

See RAILROADS, 3; WHARVES.

TAX SALES.

See TAXATION.

TENANTS IN COMMON.

See CO-TENANCY; PARTITION.

TENDER.

See SALES, 14.

TESTAMENTARY CAPACITY.

See WILLS, 1-3, 5, 6.

TOWNS.

See CORPORATIONS, 21-24.

TRESPASS.

1. LAW AFFORDS SAME PROTECTION TO EQUITABLE AS TO LEGAL TITLE, in an action of trespass to try title. *Easterling v. Blythe*, 45.
2. STATUTE DIRECTING THAT ACTION OF TRESPASS TO TRY TITLE SHALL BE TRIED "conformably to the principles of trial by ejectment," was not intended to introduce all the incidents and consequences attached to that form of action at the common law; its object was simply to furnish a mode of procedure to ascertain in whom the right of property resides. *Id.*
3. IN ACTION FOR EXCESSIVE PERSONAL INJURIES inflicted by defendant in resisting the attempt of the plaintiff to dig ore from the defendant's mine, it is competent to prove that angry feelings had arisen between the parties in regard to their respective right to the possession of the ore bank previous to the beating, in order to show that the plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendant. *Riddle v. Brown*, 202.
4. WHETHER BEATING ADMINISTERED IN REPELLING TRESPASS upon defendants was excessive and beyond what was necessary for the defense and maintenance of their possession is a matter purely for the jury to determine under all the facts and circumstances of the case. *Id.*
5. OWNER OF PART OF REVERSION OR REMAINDER OF LAND, between whom and another a suit is pending involving a question of waste or improve-

ments, may go upon the premises in a peaceable manner, with witnesses, to examine the same. *Conwell v. State*, 512.

See CO-TENANCY, 4-6; CRIMINAL LAW, 12; FRAUD, 1; HIGHWAYS, 6; LICENCE, 3.

TRESPASS TO TRY TITLE.

See TRESPASS, 1, 2.

TROVER.

1. CONVERSION IS GIST OF ACTION OF TROVER, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained. *Rogers v. Huie*, 363.
2. TROVER WILL NOT LIE UNLESS DEFENDANT HAS CONVERTED PROPERTY TO HIS OWN USE; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied. *Id.*
3. AUCTIONEER NOT LIABLE TO TRUE OWNER AS FOR CONVERSION, where he receives and sells stolen goods in the regular course of business, and pays over the proceeds of sale to the felon without notice that the goods were stolen. *Id.*
4. PLAINTIFF IN ACTION OF TROVER MAY MAKE DEMAND BY AGENT. *Buel v. Pumphrey*, 714.
5. NO DEMAND AND REFUSAL ARE NECESSARY IN ACTION OF TROVER where there has been a tortious taking and conversion; otherwise if the possession was at first legal, and the holding afterwards tortious. *Id.*
6. DECLARATION THAT PARTY "WILL NOT DELIVER THE GOODS TO ANY PERSON whatsoever," when a demand has been made, will be deemed a refusal, and, *quoad* such goods, a conversion. *Id.*

See BAILMENTS; INFANCY.

TRUSTS.

1. WHERE PURCHASE IS MADE WITH JOINT FUNDS, AND CONVEYANCE IS MADE TO ONE only of the parties interested in the purchase money, he holds the property in trust for his associate, to the extent of the funds by him advanced. *Buck v. Swazey*, 681.
2. WHERE NOTES SECURED BY MORTGAGE ARE PURCHASED BY JOINT FUNDS of two persons, and the purchase is taken in the name of one only, a resulting trust arises in favor of the other, to the extent of the funds he has advanced, and this trust is not discharged by a memorandum made by the person taking the legal title, which, after reciting the joint interest of the two, adds that the person taking the title agrees to account and pay to the other one half the sums received on the notes as collected. *Id.*
3. RESULTING TRUST IN NOTES SECURED BY MORTGAGE ATTACHES TO LAND MORTGAGED to secure their payment, when the mortgage is foreclosed by the person holding the legal title to the notes. *Id.*
4. NO RESULTING TRUST CAN BE CREATED BY AFTER ADVANCES, or funds subsequently furnished. *Id.*
5. INTEREST IN TRUST ESTATE MAY BE CONVEYED, and the person conveying will be equally compelled to convey when he acquires title, as if the title had been in him at the time of making such contract. *Id.*

6. RESULTING TRUST IS CREATED IN NOTES SECURED BY MORTGAGE where the purchase is made with the joint funds of two persons and the title is taken in the name of but one; and in such a case, if the *cestui que trust* conveys an interest in the property to the plaintiff, a trust is created in his favor which attaches to the land if the mortgage is foreclosed, and the trustee can bring a suit in his own name against the trustee to enforce the trust. *Id.*
7. ASSIGNEE OF INTEREST IN TRUST ESTATE MAY MAINTAIN ACTION IN HIS OWN NAME in equity, although he could not maintain such an action at the common law. *Id.*
8. ON ASSIGNMENT OF INTEREST IN TRUST ESTATE, the trustee holds the land in trust for the assignee, and a conveyance will be directly enforced from the trustee in his favor, and the conveyance when made will discharge the assignor from so much of his contract as shall thereby have been performed. *Id.*
9. CONVENTIONAL TRUST CAN NOT BE SET UP ON SPECIAL PAROL AGREEMENT inconsistent with the terms of the deed. *McElderry v. Shipley*, 703.
10. USE WAS MERE CONFIDENCE IN FRIEND, before the statute of uses, that the feoffees to whom the lands were given should permit the feoffor and his heirs, and such other persons as he might designate, to receive the profits of the land. *Ware v. Richardson*, 762.
11. STATUTE OF USES TRANSFERRED USE INTO POSSESSION by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee. *Id.*
12. TRUST IS USE NOT EXECUTED UNDER STATUTE OF USES IN CESTUI QUE USE, but the legal estate is vested in the grantee or trustee. *Id.*
13. USE WILL NOT BE PREVENTED FROM BEING EXECUTED IN CESTUI QUE USE by the mere interposition of a trustee to protect and secure a trust estate in a third person, even though a married woman, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust. *Id.*
14. USE IS EXECUTED IN TRUSTEE when the devise or deed is in trust "to collect and pay over" the rents and profits to another. *Id.*
15. USE IS EXECUTED IN CESTUI QUE USE when the devise or deed is in trust to permit another to "enjoy" the rents and profits. *Id.*
16. WHERE TRUSTEE EXECUTES POWER OF ATTORNEY to a third person with authority to release the deed, and the latter does so by and in the name of the trustee, and the land is released, not to the grantor in the trust deed, but to a purchaser under him, the deed of trust will be treated as duly and regularly released. *Bryan v. Stump*, 139.
17. ONE UNDERTAKING TO ACT FOR ANOTHER CAN NOT ACT FOR HIMSELF, as a general rule, in the same matter, but it is not universally true that a trustee can not purchase the trust estate; circumstances may arise to render it necessary to protect the interests of the *cestuis que trust*. *Spindler v. Atkinson*, 755.
18. TRUSTEE MAY PURCHASE AT SHERIFF'S SALE PROPERTY HELD IN TRUST under a deed void as to the grantor's creditors, and must be treated as the purchaser of the grantor's entire interest at the date of the deed, in the absence of fraud on his part in connection with such sale. *Id.*
19. TRUSTEE CAN NOT HOLD TRUST PROPERTY FOR HIS OWN BENEFIT, BUT IS ENTITLED TO REIMBURSEMENTS for his expenditures and improvements,

although he can purchase such property at a sheriff's sale made without his instrumentality. *Id.*

20. INTEREST OF CESTUIS QUE TRUST INURES TO BENEFIT OF CREDITORS when purchased at a sheriff's sale by a trustee of a deed of trust void as to creditors. *Id.*
21. TRUSTEE'S DESIGNS IN PURCHASING AT SHERIFF'S SALE ARE IMMATERIAL, whether it be for himself or for the purpose of quieting his title as trustee; because no matter what his intention might be, the law will protect *cestuis que trust* against the acts of the trustee. *Id.*
22. IN SALES BY TRUSTEE, RULE CAVEAT EMPTOR APPLIES. *Sutton v. Sutton*, 109.

See MARRIED WOMEN, 2-8.

TRUSTEES.

See CORPORATIONS, 8, 9, 21-24.

TRUSTEES' SALES.

See TRUSTS, 22.

UNDUE INFLUENCE.

See WILLS, 4.

UNRECORDED DEEDS.

See DEEDS, 11, 12.

UNSEAWORTHINESS.

See INSURANCE—MARINE, 1-3.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 4.

USES.

See TRUSTS, 10-15.

USURY.

See MORTGAGES, 7.

VENDOR AND VENDEE.

1. VENDEE OF LAND UNDER EXECUTORY CONTRACT DOES NOT WAIVE OBJECTION to the title merely by going into and remaining in possession. There must be other facts, such as show that he had a knowledge of its defects, and intended to accept such title as could be made, and to rely, in case of its failure, upon the covenants of warranty for redress. *Jones v. Taylor*, 48.
2. VENDEE OF REAL ESTATE IS PUT ON GUARD AS TO TITLE by a contract to convey to him lots "by the same title" by which a certain person "held them at the time of his death;" such language is as forcible as the legal maxim of *caveat emptor*; and it is sufficient, where he claims a defect in the title, that the conveyance placed him in actual possession of the premises. *Salmon v. Hoffman*, 322.

3. VENDOR HAS LIEN ON LAND SOLD for the payment of the purchase money, even where the title has been fully conveyed, if he has taken no security for the payment; and the rights of a vendor who has not conveyed the title can not be of less efficacy. *Id.*
 4. VENDOR'S POSITION IS ANALOGOUS TO THAT OF MORTGAGEE, where he has not conveyed the title to the land sold. *Id.*
 5. VENDOR MAY INSERT ON PAYMENT OF OR SECURITY FOR PURCHASE MONEY on tendering a deed of the land sold, as a condition of delivering the deed. *Id.*
 6. JUDGMENT DIRECTING SALE OF REAL ESTATE ON VENDOR'S LIEN, there being no avowment of insolvency or a want of other property, is erroneous. *Eyler v. Crabbs*, 711.
- MISTAKE IN REGARD TO VALIDITY OF GRANTOR'S TITLE is no ground for relief to a purchaser, when he purchases land without agreement, express or implied, for a conveyance with warranty of the title. *Sutton v. Sutton*, 109.
8. EQUITY WILL NOT RELIEVE AGAINST MISTAKE IN QUANTITY OF LAND SOLD, when it appears that the parties intended a contract of hazard. *Id.*
 9. COURT OF EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND when the vendor has fraudulently misrepresented the number of acres contained in the tract. *Fost v. Shaffer*, 509.
 10. VENDOR OF LAND CAN NOT DEPRIVE VENDEE OF HIS RIGHT TO HAVE CONTRACT FOR SALE THEREOF rescinded in equity because of the vendor's fraudulent misrepresentations as to the quantity of land sold, by afterwards purchasing and offering to convey to the vendee an adjoining tract sufficient to make up the deficiency. *Id.*
- See AGENCY, 3; ASSIGNMENT OF CONTRACTS, 1; DEEDS; PATENTS; SALES.

VENDOR'S LIEN.

See VENDOR AND VENDEE, 3-6.

VERDICT.

See DAMAGES, 4, 5; PLEADING AND PRACTICE, 24.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES, 5, 6.

WARRANTS.

See PROCESS.

WARRANTY.

See SALES, 15.

WASTE.

See TRESPASS, 5.

WHARVES.

1. RIGHT TO COLLECT WHARFAGE AND DOCKAGE IS NOT WITHIN CALIFORNIA REVENUE ACT OF 1851, and the naked right can not be assumed to *nomine* and made liable. *De Witt v. Hays*, 352.

2. RIGHT TO COLLECT WHARFAGE OR DOCKAGE IS FRANCHISE OR INCORPORATED HEREDITAMENT, an uncertain profit issuing out of realty, and is neither real estate nor personal property. *Id.*

WIFE'S EQUITY.

See MARRIED WOMEN, 9, 10.

WILLS.

1. TESTATOR'S MENTAL CONDITION AT TIME OF MAKING WILL DETERMINES as to his testamentary capacity; but evidence of his condition before and afterwards may be admissible to throw light on his condition at the time of execution. *Terry v. Buffington*, 423.
2. EVIDENCE OF TESTATOR'S INCAPACITY SEVERAL YEARS AFTER MAKING WILL is, by itself, inadmissible to impeach his will; but such evidence is admissible after proof that his condition at such subsequent time was the same as at the making of the will. *Id.*
3. JUDGMENT OF LUNACY AGAINST TESTATOR FIVE YEARS AFTER MAKING WILL is, it seems, inadmissible to impeach the will, even though there is independent proof that the testator's mental condition at the date of the inquisition was the same as at the date of the will. *Id.*
4. FRAUD AND UNDUE IMPORTUNITY ARE EQUALLY FATAL TO WILL made under their influence, though they stand on different grounds. *Id.*
5. COMMON-LAW STANDARD OF TESTAMENTARY CAPACITY PREVAILS IN GEORGIA, and the statutory rule of some of the states, that the same capacity is required to make a will as to make a deed or contract, does not obtain here. *Id.*
6. MERE GLIMMERING OF REASON IS SUFFICIENT TO SUSTAIN WILL in Georgia if the testator comprehends the contents of his will, the nature of the estate he is conveying, the relations and terms upon which he stands toward his family, and his own situation and circumstances; explaining *Potts v. House*, 50 Am. Dec. 329. *Id.*
7. HEIR CAN BE DISINHERITED ONLY BY EXPRESS DEVISE OR NECESSARY IMPLICATION so strong that a contrary intention can not be supposed. *Wright v. Hicks*, 451.
8. INTENT TO DISINHERIT HEIR IS ESSENTIAL to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent. *Id.*
9. COURTS CAN NOT GIVE EFFECT TO WILL CONTRARY TO PLAIN TERMS of it, upon a mere conjecture as to the intention. *Id.*
10. THOUGH INTENT TO DISINHERIT HEIR APPEARS, IF ESTATE IS NOT DEVISED to some other person the law casts it upon the heir. *Id.*
11. WORDS "LAWFUL HEIRS," "HEIRS OF THE BODY," ETC., ARE TECHNICAL WORDS used in creating an estate in tail, and when used by the testator to indicate the one who is to take, after the determination of the life estate, are generally regarded as words of limitation, and will pass an absolute title to personal property. *Maulding v. Scott*, 298.
12. ABSOLUTE ESTATE IN CHATTELS.—A clause in a will which recites, "I also bequeath to my daughter, Sukey Mills, my negro girl Cynthia, to be enjoyed by her during her life-time, and then to descend to her lawful

heirs, together with Cynthia's increase," conveys an absolute estate in the chattel. *Id.*

13. TITLE PASSES BY DESCENT, AND NOT BY PURCHASE, the former being the worthier title, where the same quantity and quality of estate is devised that the devisee would have acquired by descent. *Gilpin v. Hollingsworth*, 737.
14. DEVISE TO EXECUTORS CAN NOT BE IMPLIED, unless such devise is necessary to give effect to the intentions of the testator. *Doe ex dem. Clendenning v. Lanius*, 518.
15. WHERE LEGATEE IS DEAD, the decree for the distribution of the estate should be in favor of his personal representative. *Luster v. Middlecoff*, 129.
16. WHERE CHARGE ON LAND BY WILL is for the payment of debts in general, the purchaser from the executor or administrator is not bound to see to the application of the purchase money. *Meeks v. Thompson*, 134.
17. GIFT OF CHATTEL FOR LIFE, LIMITATION OVER TO SUBSEQUENT DEVISEE, is good, provided such life estate be clearly expressed; but whatever will constitute, directly or constructively, an estate tail in lands will pass an absolute estate in personal property. *Maulding v. Scott*, 298.

See DOWER, 3, 4; CO-TENANCY, 2, 3; "SHELLEY'S CASE."

WITNESSES.

1. PARTIES TO ACTIONS MAY NOW TESTIFY IN CIVIL SUITS like other witnesses. *Cowles v. Bacon*, 371.
2. TESTIMONY OF PUBLIC OFFICER IS ADMISSIBLE in suit in which he is not a party, to show that he acted in that capacity. *State v. McNally*, 650.
3. SURETY ON FORFEITED FORTHCOMING BOND IS COMPETENT WITNESS in an action against the sheriff for neglect to make the money on an execution. *Poe v. Dorrah*, 196.
4. INTEREST WHICH WILL RENDER WITNESS INCOMPETENT TO TESTIFY must be some legal, certain, immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability. If the interest be remote or contingent, and not certain and immediate, the witness is competent to testify, and such remote or contingent interest will go to his credibility, but not to his competency. *Id.*
5. WITNESS MAY BE IMPEACHED BY EVIDENCE THAT DIFFERENT STATEMENT WAS MADE BY HIM to others from that he made upon oath, where he acted as interpreter and attorney for the grantor and defendant, in executing a deed, and testified for the plaintiff, from whom he received a subsequent deed for part of the land, in an action involving the amount of land conveyed, in regard to his reading over the deed to the grantor, and to the grantor's admission of the quantity of land he had agreed to convey. *McDaniel v. Baca*, 339.
6. DEPOSITION THAT WITNESS'S REPUTATION FOR TRUTH IS "NOT VERY GOOD" can not be excluded because deponent stated on cross-examination that such reputation was founded on his not fulfilling his agreements. *Hapgood v. Fisher*, 663.

See COMMON CARRIERS, 15-20; EVIDENCE, 20.









